NO. 495.

IN THE 495

Supreme Court of the United States

OCTOBER TERM, 1948

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

WJR, THE GOODWILL STATION, INC., *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

LOUIS G. CALDWELL,
DONALD C. BEELAR,
PERCY H. RUSSELL, JR.

INDEX.

CITATIONS.

Cases:

OPINIONS BELOW.

The Commission's order granting the application here at issue has not yet been reported. The decision and order of the Commission on Respondent's Petition for Reconsideration and Hearing (R. 20-24) has not yet been reported (R. 35-37). The opinion of the United States Court of Appeals, District of Columbia Circuit, entered October 7, 1948, has not yet been reported (R. 48-77). The judgment of the Court below was entered October 7, 1948 (R. 77-78).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 402 (e) of the Communications Act of 1934, as amended, 47 U. S. C. 402 (e), and under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. 347 (a).

QUESTION PRESENTED.

Whether the Commission, without notice to Respondent or according it an opportunity for a hearing, may grant an application for a new radio broadcasting station to operate on the frequency channel then licensed to Respondent, and thereafter deny, *ex parte*, without opportunity for oral argument or for hearing, Respondent's petition for reconsideration and for hearing on such action, where Respondent's petition shows that its existing radio station's present interference-free service will be destroyed in extensive areas by interference to its usable signal from the proposed new station; i.e., whether Respondent, on the facts presented with respect to such action of the Commission, is a "person aggrieved or whose interests are adversely affected" thereby within the meaning of the Communications Act of 1934, as amended, Sections 312(b), 402(b), or 405, and is entitled to a hearing before the Commission prior to taking an appeal; or, at least, whether Respondent, as a matter of due process, is entitled to be heard, in oral argument, on the issues as to its right to notice and hearing.

under such Act and the Commission's Rules and Regulations thereunder.

STATUTE AND REGULATIONS.

Certain sections of the Communications Act of 1934, as amended (47 U.S.C. 301-609) are set out in Appendix I hereto. Sections 1.382, 1.390, 1.893, 3.11, 3.22 and 325 of the Commission's Rules and Regulations in whole or in part are printed in Appendix II hereto. Relevant provisions of the Commission's Standards of Good Engineering Practice are reproduced in Appendix III.

STATEMENT.

Respondent is the licensee of radio station WJR at Detroit, Michigan. For 20 years Respondent has been the licensee of station WJR. For 13 years Respondent has been licensed to operate as a Class I-A clear channel station, for which is authorized a minimum and maximum power of 50 kw. (Rules 3.22 and 3.25(a) Appendix II). Its frequency is 760 kc. During nighttime hours there is no station, other than WJR, operating within the continental United States on 760 kc. During daytime hours (prior to this case) there was no station, other than WJR, operating within the continental United States on 760 kc.[1]

On August 22, 1946 the Commission issued a release announcing its order[2] granting, without notice or hearing, the application of Tarboro (now Coastal Plains) Broadcasting Company, Inc., to construct a new station at Tarboro, North Carolina (543 miles southwest of Detroit) to operate *day-*

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[1] F. C. C. List of Radio Broadcast Stations, Jan. 1, 1948, (16748); Television Digest, Jan. 1, 1949, P. 56.

[2] The Commission's original order was publicly released Aug. 22, 1946, and is as follows: "Public Notice No. 97431. Report No. 877. Broadcast action. August 22, 1946. Tarboro Broadcasting Co., Inc., granted CP for a new station to operate on 760 kc, 1 kw, daytime only (B3-P-4891)."

time with a power of 1000 watts on 760 kc, the frequency assigned to Respondent. This action was taken without notice to Respondent and without opportunity for hearing. The action was wholly *ex parte* and without any findings of fact.

On September 10, 1946 Respondent timely filed its Petition for Reconsideration and Hearing (R. 20-24) in accordance with Section 405 (Appendix I) and Rules 1.390 and 1.893 (Appendix II). Some three months later the Commission on December 17, 1946 released a Decision and Order denying Respondent's petition (R. 35-37). This action was taken without according Respondent any opportunity for hearing or for oral argument. In the meantime while Respondent's petition was still pending, the Commission on October 14, 1946 issued and delivered its construction permit (R. 30-32) to Coastal Plains. It was required under Paragraph 5 of the permit to commence construction by December 14, 1946 (R. 31).

From the order denying its petition, Respondent filed an appeal January 7, 1947 resulting in an opinion and judgment of the Court below reversing the Commission's order and decision.

The Commission's grant *ex parte* of the Coastal Plains application was made under a new interim policy which was announced during the pendency and prior to conclusion of a general rule-making proceeding. *In re Clear Channel Broadcasting Service*, Docket No. 6741 (R. 3-11, 37; see R. 12-16).

The Clear Channel Proceeding. Some years prior to the war Respondent, and the licensees of other clear channel stations, applied for an increase in power from 50 kw to 500 kw and sought modification of Rules to remove the 50 kw power ceiling and otherwise to improve and extend service and minimize interference limitations. In the early months of the war the Commission dismissed such applications, including Respondent's, *without prejudice*. This problem was left dormant, under the war-time freeze, until February 20, 1945 when the Commission issued its notice of

hearing in said Docket No. 6741 (R. 9-11) to which Respondent was a party as a member of the Clear Channel Broadcasting Service. The hearing was held in Docket No. 6741 beginning January 14, 1946 and ended October 31, 1947 within which period the Commission processed and granted the Coastal Plains application.

While this proceeding in said Docket No. 6741 was in progress and prior to its conclusion, the Commission on February 5, 1946 issued Public Notice 89273 (R. 12-14) announcing an interlocutory procedure as follows:

> (a) Four categories of application for clear channel authorizations were dismissed, subject to reinstatement at the conclusion of the Clear Channel Proceeding, Docket No. 6741 (R. 13).
>
> (b) As to applications requesting *daytime* operation (e.g. Coastal Plains) on a I-A clear channel (e.g. 760 kc licensed to Respondent) the Public Notice provided that each such application would be considered individually on its merits, and, if it presented any complication with the issues in the Clear Channel Proceeding, its grant, if made, would be conditional (R. 13-14).[3a]

[3a] "The Commission has been concerned with the possibility that a grant of a large number of such applications would further complicate the problems that are involved in the Clear Channel Hearing. Further study of this matter has resulted in the conclusion that in many instances placing additional daytime only stations on the U. S. 1-A channels may not unduly complicate the problems, and accordingly all such applications will be considered individually on their merits. When no conflict with a resolution of the general problems that are at issue in the Clear Channel hearing can be foreseen, additional daytime assignments on U. S. 1-A channels may be made before conclusion of the hearing. It is, however, possible to foresee that severe complications may arise by authorizing the operation of additional limited time stations, and such applications will be given careful consideration with a view to determining the possible complications, and in the event they can be foreseen, the applications may be conditionally granted for daytime operation only."

The above policy on applications for daytime stations was modified by a second interlocutory procedure set forth in Public Notice 95034 of June 21, 1946 (R. 14-16) as follows:

> (a) Action on applications for daytime stations located *more* than 750 miles from the Class I-A clear channel station would be withheld, pending conclusion of the Clear Channel Proceeding, Docket No. 6741.
>
> (b) Applications for daytime stations located 750 miles or less from the Class I-A clear channel station would be considered individually on their merits, and "may be conditionally granted" (R. 15).[4]

Pursuant to the above policy announcement of June 21, 1946, the Commission two months later granted the Coastal Plains application (R. 37, 49). It proposed a Class II daytime only station on Respondent's Class I-A clear channel at Tarboro which is not more but *less* than 750 miles from Detroit (543 miles). This action was in accord with the

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[4] "Further consideration of the problems involved in making Class II station assignments on 1-A frequencies has resulted in a decision to adopt the following procedure: (1) The Commission will withhold action on all applications involving use of 1-A frequencies, daytime or limited time, where the proposed station is more than 750 miles from the dominant 1-A station using a non-directional antenna on the frequency requested or is outside the 0.5 mv/m 50% skywave contour of the dominant class 1-A station using a directional antenna on the frequency requested. (2) The Commission will consider on their individual merits applications involving use of 1-A channels, daytime or limited time, where the proposed station is 750 miles or less from the dominant 1-A station using a non-directional antenna on the frequency or is within the 0.5 mv/m 50% skywave contour of the dominant class 1-A station using a directional antenna on the frequency requested. Applications in this category will not at this time be granted limited time, but will be considered and may be conditionally granted for daytime operation only."

second part of the above procedure as to mileage separation, but was otherwise *not* in accord therewith since the consideration of this application on its merits was entirely *ex parte*, and its grant was *not* conditioned on disposition of the issues in the Clear Channel Proceeding, Docket No. 6741.

Daytime Skywave Cases. This case is but one of a group of eight cases which were similarly acted upon without notice or hearing, and in which petitions for rehearing were similarly denied without hearing or argument, and appeals were similarly taken to the Court below. *See FCC Fourteenth Annual Report for the Fiscal Year ending June 30, 1948, Page 14.*[5]

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[5] *Skywave cases.*—These eight cases are discussed as a group since they are all appeals taken by the licensees of class I stations on clear channels who alleged that their stations would suffer daytime skywave interference by reason of the assignment of new stations operating daytime only on the same channels. In the first case, it was contended that the Commission's assignment of a daytime station on the channel presently assigned to Station WJR prior to the determination of the clear channel hearing was improper in that it prejudiced WJR's desire to apply for permission to operate with increased power. Oral arguments on three cases were held in which the Commission contended that under its existing Rules and Standards of Good Engineering Practice appellants were not entitled to protection against daytime skywave interference and had not been deprived of a right to hearing contrary to constitutional or any other legal requirements. All of these cases were pending in the United States Court of Appeals for the District of Columbia at the close of the fiscal year 1947: *Wilson, Inc.* v. *Federal Communications Commission*, No. 9434, U. S. Ct. of Appeals, D. C.; *Courier Journal & Louisville Times Co., Inc.* v. *Federal Communications Commission*, No. 9502, U. S. Ct. of Appeals, D. C.; *National Life & Accident Insurance Co.* v. *Federal Communications Commission*, Nos. 9510 and 9511, U. S. Ct. of Appeals D. C.; *WGN, Inc.* v. *Federal Communications Commission*, No. 9497, U. S. Ct. of Appeals, D. C.; *Crosley Broadcasting Corp.* v. *Federal Communications Commission*, No. 9501, U. S. Ct. of Appeals, D. C.; *WJR the Goodwill Station, Inc.* v. *Federal Commu-*

1. *L. B. Wilson, Inc.* v. *F. C. C.* (*D. C. Cir.*) No. 9434, April 12, 1948, 170 F. 2d 793. The Commission on May 10, 1946 granted, without a hearing, an application for a new daytime station at Philadelphia, Pa. on 1530 kc, the frequency licensed to Class I-B clear channel station WCKY at Cincinnati, Ohio. On November 14, 1946, the Commission denied without hearing or argument Station WCKY's petition for reconsideration and hearing. Its petition showed that Station WCKY would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. The Court below reversed the Commission.

2. *WJR, The Goodwill Station, Inc.* v. *F. C. C.* (D. C. Cir.) No. 9495, October 7, 1948, ... F. 2d. ..... The Commission on December 5, 1946 granted, without a hearing, an application for a new daytime station at Clanton, Ala., on 760 kc, the frequency licensed to Class I-A clear channel station WJR, at Detroit, Mich. On February 20, 1947 the Commission denied, without hearing or argument, Station WJR's petition for reconsideration and hearing. Its petition showed that Station WJR would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. The Court below reversed the Commission.

3. *WGN, Inc.* v. *F. C. C.* (D. C. Cir.) No. 9497. The Commission on November 21, 1946 granted, without a hearing, an application for a new daytime station at Richmond, Va., on 720 kc, the frequency licensed to Class I-A clear channel station WGN at Chicago, Ill. On February 20, 1947 the Commission denied, without hearing or argument, Station WGN's petition for reconsideration and hearing. Its petition showed that Station WGN would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. This case is still pending in the Court below.

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nications Commission, Nos. 9495 and 9496, U. S. Ct. of Appeals, D. C. On April 12, 1948, the court issued a decision in *L. B. Wilson* v. *Federal Communications Commission*, No. 9434, reversing the Commission and remanding that matter for further proceedings. The seven remaining skywave cases were still pending at the end of fiscal 1948."

4. *Crosley Broadcasting Corp.* v. *F. C. C.* (D. C. Cir.) No. 9501. The Commission on December 5, 1946 granted, without a hearing, an application for a new daytime station at St. Paul, Minn. on 700 kc, the frequency licensed to Class I-A clear channel station WLW at Cincinnati, Ohio. On February 20, 1947, the Commission denied, without hearing or argument, Station WLW's petition for reconsideration and hearing. Its petition showed that Station WLW would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. This case is still pending in the Court below.

5. *Courier Journal & Louisville Times Co., Inc.*, v. *F. C. C.* (D. C. Cir.) No. 9502. The Commission on November 15, 1946 granted, without a hearing, an application for a new daytime station at Stillwater, Okla. on 840 kc, the frequency licensed to Class I-A clear channel Station WHAS at Louisville, Ky. On February 20, 1947 the Commission denied, without hearing or argument, Station WHAS's petition for reconsideration and hearing. Its petition showed that Station WHAS would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. This case is still pending in the Court below.

6. *WSM, Inc.* v. *F. C. C.* (D.C. Cir.) No. 9510. The Commission on September 20, 1946 granted, without a hearing, an application for a new daytime station at Altoona, Pa., on 650 kc, the frequency licensed to Class I-A clear channel Station WSM at Nashville, Tenn. On March 6, 1947, the Commission denied, without hearing or argument, Station WSM's petition for reconsideration and hearing. Its petition showed that Station WSM would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. This case is still pending in the Court below.

7. *WSM, Inc.* v. *F. C. C.* (D. C. Cir.) No. 9511. The Commission on September 19, 1946 granted, without a hearing, an application for a daytime station at Crewe, Va., on 650 kc, the frequency licensed to Class I-A clear channel station WSM at Nashville, Tenn. On March 6, 1947, the Commission denied, without hearing or argument, Station WSM's petition for reconsideration

and hearing. Its petition showed that Station WSM would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. This case is still pending in the Court below.

The common problem presented by this and the above seven cases is concerned with (1) daytime skywave service rendered by clear channel stations, and (2) interference from daytime only stations to the daytime groundwave or skywave signals of clear channel stations. The existence of such daytime service and interference is based upon engineering data presented by both government and industry radio engineering experts. This is the subject matter dealt with in the interim Public Notice of June 21, 1946 (R. 14-15).[6]

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[6] *Thirteenth Annual Report, F. C. C., Fiscal Year Ending June 30, 1947*, pp. 17-18: "SKYWAVE INTERFERENCE. A large percentage of daytime stations have been authorized to operate on clear channels. Heretofore the matter of daytime skywave interference has been of no particular significance in that there were so few daytime stations and they were generally so far removed from the dominant clear channel stations that no interference was involved. As a result of the large number of daytime stations now in operation, however, interference to the dominant stations during the so-called transition period from nighttime to daytime and from daytime to nighttime has become a problem necessitating consideration. For the purpose of obtaining data on the subject, the Commission in June 1947 conducted a hearing in the matter of promulgating rules, regulations and standards concerning daytime skywave transmissions of standard broadcast stations (Docket 8333) which may necessitate further amendments and changes in the engineering standards to take care of interference of this nature. A decision with respect to recommended amendments had not been made at the close of the fiscal year." Respondent was a party to said daytime skywave proceeding and the public record therein made prior to reargument of this case in the Court below established that operation of the Coastal Plains station will subject Station WJR's skywave and groundwave service to objectionable interference within its normally protected contour.

The instant case is in no way distinguishable from the above-seven cases, except as to the *degree* of service and interference stated in the pleadings.[7] The Commission in this case bases its position on a provision of its Standards of Good Engineering Practice that "during daytime the Class I station is protected to the 100 uv/m groundwave contour" (Commission Petition pp. 26, 27). This position is now taken flat-footedly with the inference that if Respondent's affidavit had established interference within its 100 uv/m contour, the Commission would have accorded Respondent notice and hearing.

But in each of the other seven above-cited cases interference *was* established within the 100 uv/m contour, and, nevertheless, a hearing was denied, and the right thereto was contested in the Court below.

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[7] This difference is pointed up in the *concurring* opinion to the decision of the Court below in the 2nd above cited case, *WJR* v. *F. C. C.* (D. C. Cir. No. 9495) — F. 2d. —, as follows: PRETTYMAN, J., with whom EDGERTON, J., concurs, concurring: I concur in this opinion and decision. I make this separate statement in order to emphasize that this case, with No. 9434, *L. B. Wilson, Inc.* v. *Federal Communications Comm'n*, decided April 12, 1948, and No. 9464, *WJR, The Goodwill Station, Inc.* v. *Federal Communications Comm'n*, decided this day, together present all phases of the problem upon which the court differs in opinion. In the present case, the petitioner alleged that the proposed new station would cause substantial interference 'well within its 100 uv/m contour'; the supporting engineer's affidavit asserted the same interference and, indeed, showed it at the 200 uv/m contour. The opposition to that petition asserted that the alleged interference would not be from groundwave, and that normal protection, under the Commission's Standards, is against groundwave only. Examination of the Standards shows that the question thus presented was indeed substantial. There is a serious and debatable question whether the Standards, thus the licenses of all Class I clear channel stations, give protection against skywave in the daytime. Therefore, I agree that this appellant was entitled to a hearing before his petition was denied."

WJR Service and Interference. Respondent's petition before the Commission alleged that operation of the Coastal Plains station would subject the present interference-free service of Station WJR to objectionable interference (R. 20). The affidavit accompanying Respondent's petition established that (R. 22-24):

> (a) *Middle States Area.* Station WJR delivers a useable daytime signal over all or a portion of the states of Indiana, Ohio, Pennsylvania and New York, which would be destroyed by interference from the proposed Coastal Plains station.
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> (b) *Lower Michigan Area.* Station WJR delivers a useable daytime signal over lower Michigan which in all or a portion of 12 counties in the northern part would be destroyed by interference from the proposed Coastal Plains station. This area includes all of Leelanau, Charlevoix and Cheboygan counties in which there are no broadcast stations, all of Emmet county in which there is one local station (WMBN), and a part of eight other counties in only two of which are stations (WKLA, WTCM), both local.
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> (c) *Upper Michigan Area.* Station WJR delivers a useable daytime signal over all of the 14 counties of upper Michigan, which would be destroyed by interference from the Coastal Plains station. In seven of these counties there are no radio stations. (There is one local station in each of the other seven counties, WJMS, WSUD, WHDF, WOMJ, WJPD, WMIQ and WDBC).

Over most of the Middle States area above where WJR's present interference-free service would be destroyed, it was conceded that a better signal is provided by other stations. But with respect to both the lower Michigan area and the upper Michigan area above, WJR provides "the best signal available" to most of this region. (The portion excluded

would be the built-up city areas and that within the service of the ten local stations.) Also with regard to the lower and upper Michigan area described above, it is established that:

(a) This area is unusually free of atmospheric noise with the result that a very low order of signal will provide an acceptable service, (R. 24) and

(b) In this area WJR is in fact "the most listened to station" based upon the Commission's own Radio Survey compiled for it by the Bureau of Census (R. 23).

The record in this case establishes that station WJR in fact delivers a groundwave service over the three above-described areas, which under Rule 3.11 (Appendix II) constitute a portion of Respondent's "primary service area" or "intermittent service area" or both. (Subsequent proceedings established that WJR also provides a secondary service daytime over a more extensive area). And the record in this case also establishes that the operation of the Coastal Plains station will cause interference which will destroy WJR's service within such areas.

ARGUMENT.

I.

Petitioner's statement of the "Question Presented" (p. 2) quite ignores the facts of record and includes an assumption that no case is presented. This begs the issue as to whether the facts of record raise any substantial question, and whether that issue should be heard initially by the Commission or on appeal.

On the facts stated Respondent is an interested party to the Commission's action and entitled under the statute and regulations to notice and hearing on issues of fact or law as follows:

(a) Grant of the Coastal Plains application constituted an indirect modification of Respondent's license,

which, without prior notice to Respondent and opportunity for hearing, is contrary to Section 312(b) and Rule 1.382 as established in *F.C.C.* v. *National Broadcasting Company*, 319 U. S. 239; (see *F.C.C.* v. *Sanders Brothers Radio Station*, 309 U. S. 470 and *Ashbacker Radio Corporation* v. *F.C.C.*, 326 U. S. 339).

(b) Grant of the Coastal Plains application would not serve public convenience, interest, or necessity within the meaning of Section 319(a) and Rules 1.382 and 1.390 by reason of the resulting loss of service to the public being rendered by Respondent's station in the lower and upper areas of Michigan above stated (p. 12).

(c) Respondent's petition showed that it is a "person aggrieved or whose interests are adversely affected" by the Commission's action within the meaning of Sections 405 and 402(b) and Rule 1.390, and was, therefore, a person entitled to notice and hearing.

(d) Respondent station, in the above-described lower and upper Michigan areas (p. 12) renders an interference-free primary service or intermittent service as defined in Rule 3.11, that such service over much of these areas is the best service available and in fact the most listened to service (R. 23, p. 13) and that such service is recognized under the Commission's Standards of Good Engineering Practice, Appendix II B, D and F, and grant of the Coastal Plains application would subject Respondent's service to objectionable interference.

(e) The interlocutory procedure set forth in the Commission's Public Notice of June 21, 1946 (R. 14-16, p. 6), pursuant to which the Commission denied Respondent's petition (R. 37, 49), is not a valid statutory rule or regulation promulgated under and pursuant to procedure set forth in Section 303(f) or the Administrative Procedure Act (5 U. S. C. 1002), and

that the provision thereof for duplicating daytime stations on Class I-A clear channel assignments which are separated *less* than 750 miles, is arbitrary and capricious and wholly unsupported by any findings of fact and not supported by a final action in any rule-making proceeding.

(f) In any event the Commission's action is contrary to the express provision of such Public Notice of June 21, 1946 which stated that if any daytime duplication is authorized, the grant would be conditional (R. 15, p. 6). The permit granted Coastal Plains contains no such condition (R. 30-32)[8] so as to avoid any conflict with final resolution of the issues in the Clear Channel Proceeding, Docket No. 6741 (R. 12-16, pp. 5, 21). The failure to make the Coastal Plains grant subject to such condition, e.g. as set out in Respondent's license for similar purposes, (R. 17 and 33) is prejudicial to Respondent's interest as a party to said Docket No. 6741 proceeding. To illustrate, if the conclusion on issues No. 3, 7 and 8 thereof (R. 9-11) results in regulations authorizing Respondent's station an increase in power, such authorization would present an interference conflict with the Coastal Plains station which could prevent the grant of Respondent's application therefor without indirect modification of the Coastal Plains license.

[8] A condition for the purpose of protecting the Commission and interested parties pending final action in the pending rule-making proceeding, Docket 6741, which has been employed in other grants, would provide: "The Commission reserves the right during said license period, of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period." (R. 17, 33.)

(g) Respondent's petition shows that under Rules 3.22 and 3.11 the "primary service area" of its station is entitled to be "free from objectionable interference from other stations on the same and adjacent channels . . ." The remaining part of Rule 3.22 pertains to "secondary service area" and a reading of that Rule shows that the reference therein to "Engineering Standards of Allocation" is limited to such secondary service (nighttime skywave service which is not at issue here). The Commission's statutory Rules and Regulations contain no provision limiting the primary service area of a Class I-A station to its 100 uv/m contour. Such provision is found in the Commission's Standards (Appendix IIIA) but even assuming this provision to be incorporated by reference into Rule 3.22 as pertaining to primary service, this is qualified and inconsistent with other provisions of such Standards, e.g. Appendix III B, D, F and G.

(h) If the Commission's Standards are considered to be controlling Respondent's petition shows that its primary service is entitled to protection from objectionable interference under other provisions of such Standards. For example, over much of the lower and upper Michigan area, WJR renders an adequate signal and in fact the best signal available and is the most listened to station (R. 21, 23, p. 13) which is *prima facie* in accord with such Standards, Appendix III B and G. Moreover these Standards, Appendix III D and F recognize and provide for intermittent service as defined in Rule 3.11 in the case of a Class I-A clear channel.

(i) The minimal facts of record show that Respondent's petition raised a question as to the balance of public convenience, interest, or necessity, between station WJR's existing service and the proposed new service, under Section 319(a) and Rules 1.382 and 1.390,

the determination of which warranted and required that Respondent be accorded notice and opportunity for hearing.

It should be quite obvious that the above issues, when associated with the first instance of a duplication of any station on Respondent's assignment, make out a substantial question upon which, at least, Respondent was entitled to the minimal right of oral argument on its petition before the Commission on the issue of whether it was entitled to notice and hearing.

A contrary rule would conflict with the basic pattern of administrative proceedings and judicial review thereof, and result in a party having its first hearing on appeal instead of before the administrative agency in which is vested initial and primary jurisdiction.

II.

This case is clearly distinguishable from all cases cited by Petitioner (pp. 10-11).

If Respondent was a party in interest to the Commission's action, it was entitled to "be made a party to the proceeding." *FCC* v. *National Broadcasting Company, supra* (319 U. S. 239, 245). This distinguishes the interest of Respondent in this case from those who sought to intervene in the various *Tide Land Cases* cited by Petitioner.

In the *Morgan Case*, 298 U. S. 468, the interested parties therein were accorded a notice and hearing. This Respondent was not, nor was it allowed an oral argument on the question of its right to a hearing.

The same distinction exists with respect to *N.L.R.B.* v. *Mackay R. & T. Co.*, 304 U. S. 351. The same is true with respect to *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U. S. 197. In both *Sproul* v. *F.R.C.*, 54 F. 2d 444, and *W.O.W.L.A.* v. *F.R.C.*, 65 F. 2d 484, the appellants had a notice and hearing. In *Peoria Braumeister Co.* v. *Yellowley*, 123 F. 2d 637, the permittee had due notice of new regu-

lations which, if it had taken advantage of, accorded it the right of notice and hearing. (This permittee did not even take advantage of the opportunity for oral argument of its case on appeal). *State ex rel. School District* s v. *Carr*, 166 Wis. 103, is clearly inapplicable since it pertains to procedural rights under a state law between two agencies of government, namely a School District and the State Superintendent of Schools, as to which matter we would presume the state law to be conclusive however interpreted by the courts of that State.

In the instant case, Respondent was deprived of any notice, had no hearing before an examiner or the Commission and was denied any hearing or argument as to its rights thereto. On this record, therefore, this case is similar to the *KOA* Case, *F.C.C.* v. *N.B.C. supra*, with but two material differences.[9] That case was concerned with nighttime duplication on a clear channel assignment and interference to a secondary service, whereas this case is concerned with daytime duplication and interference to primary and intermittent service. Second, in that case the Commission's action appeared to be in conflict with its own statutory regulations, whereas in this case the Commission's action is not supported by any express provision of its statutory regulations but is premised on a press release procedure (R. 37, 49) published on a subject at issue in a pending rule-making proceeding prior to its completion, and on a provision of an ancillary document of engineering practices, the status of which as a rule or regulation[10] is at is-

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[9] A hearing was held in the *KOA Case* but it was not permitted to appear or participate (241), and it was later allowed to file a brief and present oral argument, *amicus curiae* (242, 246), neither of which was allowed this Respondent.

[10] The non-statutory character of the Commission's Standards, as contrasted with its Rules and Regulations, is established by the Commission's statement thereon at the time of their original issue in 1939. *Fifth Annual Report, F. C. C. Fiscal Year ending June 30, 1939*, p. 41: "Scope of Standards of Good Engineering Prac-

sue, and other provisions of which support Respondent's position as an interested party to the Commission's action as set forth in its petition.

This case and the *KOA Case* are otherwise similar. In both the issue involved the interpretation and application of Section 312(b) and the provisions of Rules and Regulations on the duplication of stations on clear channel assignments and questions of service and interference. In both the Commission refused to recognize the existing licensee as a party in interest, and denied petitions for hearing.

III.

Are the interests of a party and the issue of a substantial question to be determined upon a consideration of the statutory standard of public interest and public service, or upon a microvolt concept of non-statutory engineering practices?

The Commission's position here is based on a microvolt

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tice" * * * "Necessity for the standards arises by reason of the fact that all of the technical principles of allocation, and use of facilities cannot be incorporated in the rules and regulations, because of the rapid changes taking place. The rules and regulations cover only the basic and more general principles. To obtain uniformity in presenting technical data on all applications concerning standard broadcast stations, it is necessary that the Commission enunciate the manner and method in which the data shall be presented. This provides a distinct advantage in the administration of the technical regulations, greatly improves the uniformity of action on formal applications, and serves as a guide to engineers. Many of the standards set out certain methods of compiling and submitting data. The provisions of the Standards may be divided into three classes, as follows: (1) Those provisions which are incorporated by reference in the rules and regulations and which have substantially the same meaning and effect as the rules and regulations. (2) Those provisions which go beyond the rules and regulations so as to disclose policies and principles of allocation and regulation. (3) Those provisions which are included primarily as a guide to applicants and licensees."

concept. It, and the minority opinion of the Court below, state: Respondent did not claim interference within the 100 uv/m contour; under the Commission's Standards of Good Engineering Practice a "Class I station is protected to the 100 uv/m groundwave contour" (Appendix III A); and, therefore, Respondent failed to state a case or raise a substantial question. (Compare Minority Opinion, R. 69-77, with footnote 7). The Commission's position is therefore based on an arbitrary difference of 68 microvolts, and in disregard of the facts shown that over the areas in question Respondent's stations render a satisfactory and usable service which interference resulting from the Commission's action would destroy.

Public interest and public service considerations under the statute and the Commission's statutory regulations clearly support Respondent's position as a party in interest. For example, the Commission could find and conclude, after a hearing on the Coastal Plains application, that considerations of public interest warrant and require a denial, since a grant would cause objectionable interference to an existing interference-free service being rendered by station WJR to extensive areas in northern and upper Michigan over much of which no other service is available and where, in fact, WJR delivers a usable service and is the "most listened to station".

If the statutory standard, when applied to the issues presented, is broad enough to support a determination either way by the Commission, then it should be sufficiently broad to qualify Respondent as a party in interest to a proceeding for the determination of such issues.

The Commission's position is not supported by any provision of statute or of its statutory regulations. Its Standards do not and are not intended to have the status of statutory regulations (fn. 10); or, at least, there is a substantial question as to their status, as well as the status of the Public Notice of June 21, 1946 (R. 14-16). But setting this

question aside; a consideration of both shows that they recognize the position of Respondent as an interested party.

(a) As to said Public Notice the Commission states: "It is, however, possible to foresee that severe complications may arise by authorizing the operation of additional limited time stations . . ." (R. 14), and "Applications in this category will not at this time be granted limited time, but will be considered and may be conditionally granted for daytime operation only." (R. 15) (See also fn. 6).

(b) As to the Standards, one provision recognizes that "Class I stations render service to all three service areas" (Appendix III D), including "intermittent service", as defined in Rule 3.11 (c), which Respondent's petition shows it is rendering over the areas in question. Another provision states that such service "may be down to only a few microvolts in certain areas", and that "*Only Class I stations are assigned for protection from interference from other stations into the intermittent service area.*" (Appendix III F).

Respondent's petition shows that northern and upper Michigan is an area where a signal of a few microvolts does in fact provide a usable and popular service. Moreover, with respect to some sixteen Counties in such area, Respondent's petition made out a case requiring a hearing under the express terms of another provision of such Standards (Appendix III B).

In contrast to the Commission's position here, it is significant that neither the statute nor statutory regulations empirically attempt to measure public service or the interest of a party in terms of microvolts. Also the microvolt concept relied on here is exactly opposite to the position taken by the Commission in denying any hearing on the seven companion daytime skywave cases where interference was shown within the 100 uv/m contour.

A fair and realistic consideration of the facts set forth in Respondent's petition under the statute and the statutory regulations, and also under the Standards if they be material, clearly establishes that Respondent's existing interference-free service over extensive areas should not be destroyed arbitrarily by an *ex parte* action.

On this issue the Court below held:

"We conclude that under the due process clause of the Fifth Amendment WJR is entitled to a hearing before the Commission as to the sufficiency of the allegations of its petition for reconsideration, assuming their truth, to show indirect modification of its license by the granting of the Coastal Plains application."

The rationale of this rule is clear. It does not require that every stranger to a case is entitled to a hearing. It does provide, and correctly so, that a person who shows that he will be aggrieved or injured by an action, is entitled to a hearing, or, as a minimal right, to a hearing on the question of his status as an interested party. Had Respondent's petition failed to show the loss of any interference-free service it would have had no standing either before the Commission or an appeal. Where such showing is made, a party is entitled to be heard. Where the showing made is dependent on a construction of a statute or regulation, a party is entitled at least to oral argument on the issues as to its interest and right of hearing.

The characterization given to the opinion of the Court below by the Petitioner (Pet. pp. 7-9) is altogether too sweeping. The contention of the Petitioner that it and other agencies will have "no leeway or discretion whatever to make summary disposition of pleadings that are insubstantial or frivolous" is clearly unwarranted and is denied by the Commission's own actions in recent cases, e.g. Memorandum Opinion and Order, *In Re: Northern Corporation (WMEX)*, Docket No. 8911, Nov. 3, 1948, Memorandum Opinion and Order, *In re: New England Theatres, Inc.* Docket No. 8557, Jan. 18, 1949, wherein petitions, (which

were neither insubstantial or frivolous were denied without hearing or argument on grounds, not that the opinion in this case is not final, but that such cases were distinguishable from the opinion of the Court below in this case.

CONCLUSION.

For these reasons set forth above, it is submitted respectfully that the petition for writ of certiorari should be denied.

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Counsel for Respondent.

APPENDIX I—STATUTE.

COMMUNICATIONS ACT OF 1934.

Sec. 303

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall— * * *

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with; * * * "

Sec. 312(b)

"Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

Sec. 319(a)

"No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written applica-

tion therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation."

Sec. 402(a) * * *

(b) "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

Sec. 405

"After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor

be made to appear: *Provided, however*, That in the case of a decision, order, or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order."

APPENDIX II—RULES AND REGULATIONS

FEDERAL COMMUNICATIONS COMMISSION RULES AND REGULATIONS

I—PRACTICE AND PROCEDURE:

1.382 "Grants without a hearing.—(a) Where an application for radio facilities is proper upon its face and where it appears from an examination of the application and supporting data that (a) applicant is legally, technically, and financially qualified; (b) a grant of the application would not involve modification, revocation, or nonrenewal of any existing license or outstanding construction permit; (c) a grant of the application would not cause additional electrical interference to an existing station or stations for which a construction permit is outstanding within its normally protected contour as prescribed by the applicable Rules and Regulations; (d) a grant of the application would not preclude the grant of any mutually exclusive application; and (e) a grant of the application would be in the public interest, the Commission will grant the application without a hearing."

1.390 "Petitions for reconsideration or for rehearing.—(a) Where an application has been granted without a hearing, any person aggrieved or whose interests would be adversely affected thereby may file a petition for reconsideration of such action. Such petition must be filed with the Commission within 20 days after public notice is given of the Commission's action in granting the application. Such petition will be granted if the petitioner shows that:

(1) Petitioner is an existing licensee or permittee and a grant of the application would require the modification, revocation, or nonrenewal of his license or construction permit; or

(2) That petitioner is an existing licensee or permittee and a grant of the application would cause interference to his station within the normally protected contour as prescribed by applicable Rules and Regulations; or

(3) At the time the application was granted, petitioner had a mutually exclusive application pending before the Commission; or

(4) A grant of the application is not in the public interest."

1.892 "Contents; relief requested.—(a) * * *

(b) The petition for rehearing may request (1) reconsideration, either in cases decided after hearing or in cases of applications granted without hearing under title III of the act; (2) reargument; (3) reopening of the proceeding; (4) amendment of any finding, or (5) other relief. Such petition shall be specific as to the form of relief sought and, subject to this requirement, may contain alternative requests."

II. A. Rules Governing Standard Broadcast Stations

3.11 "Service areas.—(a) The term 'primary service area' of a broadcast station means the area in which the groundwave is not subject to objectionable interference or objectionable fading.

(b) The term 'secondary service area' of a broadcast station means the area served by the skywave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity.

(c) The term 'intermittent service area' of a broadcast station means the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading."

3.22 "Classes and power of standard broadcast stations. (a) Class I station.—A Class I station is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in

3.25 or in accordance with the Engineering Standards of Allocation. The operating power shall be not less than 10 kilowatts nor more than 50 kilowatts. (Also see Sec. 3.25(a) for further power limitation.)"

3.25 "Clear channels: Class I and II stations.—The frequencies in the following tabulations are designated as clear channels and assigned for use by the classes of stations given:

(a) To each of the channels below there will be assigned one Class I station and there may be assigned one or more Class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 750, 760, 770, 780, 820, 830, 840, 870, 880, 890, 1020, 1040, 1100, 1120, 1160, 1180, 1200, and 1210 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kilowatts.

APPENDIX III—STANDARDS.

FEDERAL COMMUNICATIONS COMMISSION

STANDARDS OF GOOD ENGINEERING PRACTICE CONCERNING STANDARD BROADCAST STATIONS

(Revised to October 30, 1947)

I. ENGINEERING STANDARDS OF ALLOCATION

* * *

(2) "From an engineering point of view, Class I stations may be divided into two groups:

(A)

(a) The Class I stations in Group A are those assigned to the channels allocated by section 3.25, paragraph (a), on which duplicate nighttime operation is not permitted, that is, no other station is permitted to operate on a channel with a Class I station of this group within the limits of the United States (the Class II stations assigned the channels operate limited time or daytime only), and during daytime the Class I station is protected to the 100 uv/m groundwave contour. Protection is given this class of station to the 500 uv/m groundwave contour from adjacent channel stations for both day and nighttime operations.[2] The power of each such Class I station shall not be less than 50 kw."

* * *

(B)

"When it is shown that primary service is rendered by any of the above classes of stations, beyond the normally protected contour, and when primary service to approximately 90 percent of the population (population served with adequate signal) of the area between the normally protected contour and the contour to which such station actually serves, is not supplied by any other station or stations carrying the same general program service, the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration."

* * *

(C)

"When a station is already limited by interference from other stations to a contour of higher value than that normally protected for its class, this contour shall be the established standard for such station with respect to interference from all other stations."

(D)

"The several classes of broadcast stations have in general three service areas, namely, primary, secondary, and intermittent service areas. Class I stations render service to all three service areas."

SECONDARY SERVICE

(E)

"Secondary service is delivered in the areas where the skywave for 50 percent or more of the time has a field intensity of 500 uv/m or greater. It is not considered that satisfactory secondary service can be rendered to cities unless the skywave approaches in value the groundwave required for primary service. The secondary service is necessarily subject to some interference and extensive fading whereas the primary service area of a station is subject to no objectionable interference or fading. Class I stations only are assigned on the basis of rendering secondary service."

INTERMITTENT SERVICE

(F)

"The intermittent service is rendered by the groundwave and begins at the outer boundary of the primary service area and extends to the value of signal where it may be considered as having no further service value. This may be down to only a few microvolts in certain areas and up to several millivolts in other areas of high noise level, interference from other stations, or objectionable fading at night. The intermittent service area may vary widely from day to night and generally varies from time to time as the name implies. Only Class I stations are assigned

for protection from interference from other stations into the intermittent service area."

• • •

(G)

"TABLE IV.—Protected service contours and permissable interference signals for broadcast stations."

(See Appendix to Petition of Federal Communications Commission for Writ of Certiorari, Page 27)

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ANNEX III

INTERFERENCE FROM SKYWAVE SIGNALS

(H)

(Note: The nine paragraphs under this heading deal with skywave interference, but they are silent as to any distinction between *daytime* skywave interference or *nighttime* skywave interference.)

Brief for WJR, the Goodwill Station, Inc.

NO. 495.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

WJR, THE GOODWILL STATION, INC., *Respondent*,
(COASTAL PLAINS BROADCASTING CO., INC., *Intervenor*).

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR WJR, THE GOODWILL STATION, INC.

LOUIS G. CALDWELL,
DONALD C. BEELAR,
PERCY H. RUSSELL, JR.,
Counsel for Respondent.

INDEX.

CITATION.

CASES:

channel station would be withheld, pending conclusion of the Clear Channel Proceeding, Docket No. 6741.

(b) Applications for daytime stations located 750 miles or less from the Class I-A clear channel station would be considered individually on their merits, and, if granted, would be conditional (R. 11).[5]

Pursuant to the above policy announcement of June 21, 1946, the Commission two months later granted the Coastal Plains application (R. 37, 49). It proposed a Class II daytime only station on Respondent's Class I-A clear channel at Tarboro which is not more but *less* than 750 miles from Detroit (543 miles). This action was in accord with the second part of the above procedure as to mileage separation, but was otherwise *not* in accord therewith since the consideration of this application on its merits was entirely *ex parte*, and its grant was *not* conditioned on disposition of the issues in the Clear Channel Proceeding, Docket No. 6741 (R. 14). (By a subsequent Commission Notice of May 9, 1947, it set aside the procedure provided in the Notice of June 21, 1946, and postponed action or consideration on all applications similar to Coastal Plains until conclusion and decision on Clear Channel Proceeding. See n. 17.)

[5] The said Public Notice states: "Further consideration of the problems involved in making Class II station assignments on I-A frequencies has resulted in a decision to adopt the following procedure: (1) The Commission will withhold action on all applications involving use of I-A frequencies, daytime or limited time, where the proposed station is more than 750 miles from the dominant I-A station using a non-directional antenna on the frequency requested or is outside the 0.5 mv/m 50% skywave contour of the dominant class I-A station using a directional antenna on the frequency requested. (2) The Commission will consider on their individual merits applications involving use of I-A channels, daytime or limited time, where the proposed station is 750 miles or less from the dominant I-A station using a non-directional antenna on the frequency or is within the 0.5 mv/m 50% skywave contour of the dominant class I-A station using a directional antenna on the frequency requested. Applications in this category will not at this time be granted limited time, but will be considered and may be conditionally granted for daytime operation only."

Daytime Skywave Cases. This case is but one of a group of eight cases which were similarly acted upon without notice or hearing, and in which petitions for rehearing were similarly denied without hearing or argument, and appeals were similarly taken to the Court below. *See FCC Fourteenth Annual Report for the Fiscal Year ending June 30, 1948, Page 14.*[6]

1. *L. B. Wilson, Inc.* v. *F. C. C.* (D. C. Cir.) No. 9434, April 12, 1948, 170 F. 2d 793. The Commission on May 10, 1946 granted, without a hearing, an application for a new daytime station at Philadelphia, Pa., on 1530 kc, the frequency licensed to Class I-B clear channel sta-

[6] "*Skywave cases.*—These eight cases are discussed as a group since they are all appeals taken by the licensees of Class I stations on clear channels who alleged that their stations would suffer daytime skywave interference by reason of the assignment of new stations operating daytime only on the same channels. In the first case, it was contended that the Commission's assignment of a daytime station on the channel presently assigned to Station WJR prior to the determination of the clear channel hearing was improper in that it prejudiced WJR's desire to apply for permission to operate with increased power. Oral arguments on three cases were held in which the Commission contended that under its existing Rules and Standards of Good Engineering Practice appellants were not entitled to protection against daytime skywave interference and had not been deprived of a right to hearing contrary to constitutional or any other legal requirements. All of these cases were pending in the United States Court of Appeals for the District of Columbia at the close of the fiscal year 1947: *Wilson, Inc.* v. *Federal Communiactions Commission*, No. 9434, U. S. Ct. of Appeals, D. C.; *Courier Journal & Louisville Times Co., Inc.* v. *Federal Communications Commission*, No. 9502, U. S. Ct. of Appeals, D. C.; *National Life & Accident Insurance Co.* v. *Federal Communications Commission*, Nos. 9510 and 9511, U. S. Ct. of Appeals D. C.; *WGN, Inc.* v. *Federal Communications Commission*, No. 9497, U. S. Ct. of Appeals, D. C.; *Crosley Broadcasting Corp.* v. *Federal Communications Commission*, No. 9501, U. S. Ct. of Appeals, D. C.; *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission*, Nos. 9495 and 9496, U. S. Ct. of Appeals, D. C. On April 12, 1948, the court issued a decision in *L. B. Wilson* v. *Federal Communications Commission*, No. 9434, reversing the Commission and remanding that matter for further proceedings. The seven remaining skywave cases were still pending at the end of fiscal 1948."

tion WCKY at Cincinnati, Ohio. On November 14, 1946, the Commission denied without hearing or argument Station WCKY's petition for reconsideration and hearing. Its petition showed that Station WCKY would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. The Court below reversed the Commission.

2. *WJR, The Goodwill Station, Inc.* v. *F. C. C.* (D. C. Cir) No. 9495, October 7, 1948, ... F. 2d. .... The Commission on December 5, 1946 granted, without a hearing, an application for a new daytime station at Clanton, Ala., (670 miles from Detroit) on 760 kc, the frequency licensed to Class I-A clear channel station WJR, at Detroit, Mich. On February 20, 1947, the Commission denied, without hearing or argument, Station WJR's petition for reconsideration and hearing. Its petition showed that Station WJR would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. The Court below reversed the Commission.

3. *WGN, Inc.* v. *F. C. C.* (D. C. Cir.) No. 9497. The Commission on November 21, 1946 granted, without a hearing, an application for a new daytime station at Richmond, Va., on 720 kc, the frequency licensed to Class I-A clear channel station WGN at Chicago, Ill. On February 20, 1947 the Commission denied, without hearing or argument, Station WGN's petition for reconsideration and hearing. Its petition showed that Station WGN would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. This case is still pending in the Court below.

4. *Crosley Broadcasting Corp.* v. *F. C. C.* (D. C. Cir.) No. 9501. The Commission on December 5, 1946 granted, without a hearing, an application for a new

daytime station at St. Paul, Minn., on 700 kc, the frequency licensed to Class I-A clear channel station WLW at Cincinnati, Ohio. On February 20, 1947, the Commission denied, without hearing or argument, Station WLW's petition for reconsideration and hearing. Its petition showed that Station WLW would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. This case is still pending in the Court below.

5. *Courier Journal & Louisville Times Co., Inc.*, v. *F. C. C.* (D. C. Cir.) No. 9502. The Commission on November 15, 1946 granted, without a hearing, an application for a new daytime station at Stillwater, Okla., on 840 kc, the frequency licensed to Class I-A clear channel station WHAS at Louisville, Ky. On February 20, 1947 the Commission denied, without hearing or argument, Station WHAS's petition for reconsideration and hearing. Its petition showed that Station WHAS would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. This case is still pending in the Court below.

6. *WSM, Inc.* v. *F. C. C.* (D. C. Cir.) No. 9510. The Commission on September 20, 1946 granted, without a hearing, an application for a new daytime station at Altoona, Pa., on 650 kc, the frequency licensed to Class I-A clear channel station WSM at Nashville, Tenn. On March 6, 1947, the Commission denied, without hearing or argument, Station WSM's petition for reconsideration and hearing. Its petition showed that Station WSM would be subjected to interference within its normally protected contour. —— F. C. C. Rep. ——. This case is still pending in the Court below.

7. *WSM, Inc.* v. *F. C. C.* (D. C. Cir.) No. 9511. The Commission on September 19, 1946 granted, without a hearing, an application for a daytime station at Crewe, Va., on 650 kc, the frequency licensed to Class I-A

clear channel station WSM at Nashville, Tenn. On March 6, 1947, the Commission denied, without hearing or argument, Station WSM's petition for reconsideration and hearing. Its petition showed that Station WSM would be subjected to interference within its normally protected contour. ——F. C. C. Rep. ——. This case is still pending in the Court below.

The common problem presented by this and the above seven cases is concerned with (1) daytime service rendered by clear channel stations, and (2) interference from daytime only stations to the signals of clear channel stations.[7]

In this case and in the other above-cited seven companion cases the Commission duplicated clear channel station assignments by the granting of daytime only stations pursuant to the interim procedure as announced on February 5,

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[7] The Clear Channel Proceeding developed a new subject of special inquiry concerning daytime secondary or skywave service and daytime skywave interference, Docket No. 8333: *Thirteenth Annual Report, F. C. C., Fiscal Year Ending June 30, 1947*, pp. 17-18: "SKYWAVE INTERFERENCE. A large percentage of daytime stations have been authorized to operate on clear channels. Heretofore the matter of daytime skywave interference has been of no particular significance in that there were so few daytime stations and they were generally so far removed from the dominant clear channel stations that no interference was involved. As a result of the large number of daytime stations now in operation, however, interference to the dominant stations during the so-called transition period from nighttime to daytime and from daytime to nighttime has become a problem necessitating consideration. For the purpose of obtaining data on the subject, the Commission in June 1947 conducted a hearing in the matter of promulgating rules, regulations and standards concerning daytime skywave transmissions of standard broadcast stations (Docket 8333) which may necessitate further amendments and changes in the engineering standards to take care of interference of this nature. A decision with respect to recommended amendments had not been made at the close of the fiscal year." Respondent was a party to said daytime skywave proceeding and the public record therein made prior to reargument of this case in the Court below established that operation of the Coastal Plains station will subject Station WJR's skywave and groundwave service to objectionable interference within its normally protected contour. See n. 17.

1946 and revised on June 21, 1946. In each of the other seven cases, the clear channel station licensee in its petition for rehearing claimed interference within the 100 uv/m contour, nevertheless, the Commission in each case denied a hearing. The Commission in its brief before this Court now implies that if Respondent's petition had claimed interference within the 100 uv/m contour of its station, Respondent would have been accorded notice and hearing. The Commission's past actions in these companion cases are contrary to its present contentions in this case, i.e., that Respondent's standing as an aggrieved party is determined conclusively by the 100 uv/m contour. In the treatment of those cases before the Commission its action was predicated upon the interim procedure as set forth in the Public Notice of June 21, 1946 which specified a standard of geographical separation of "750 miles or less". This case and the other above-cited seven cases are similar in that the new daytime stations were separated 750 miles or less from the dominant clear channel stations which were duplicated. This case and the other seven cases are, therefore, similar with respect to the Commission's interim procedure, except as to the degree of service and interference stated in the pleadings.[8] The record discloses no findings as to any en-

[8] This difference is pointed up in the *concurring* opinion to the decision of the Court below in the 2nd above cited case, *WJR* v. *F. C. C.* (D. C. Cir. No. 9495), — F. 2d. —, as follows: PRETTYMAN, J., with whom EDGERTON, J., concurs, concurring: "I concur in this opinion and decision. I make this separate statement in order to emphasize that this case, with No. 9434, *L. B. Wilson, Inc.* v. *Federal Communications Comm'n*, decided April 12, 1948, and No. 9464, *WJR, The Goodwill Station, Inc.* v. *Federal Communications Comm'n*, decided this day, together present all phases of the problem upon which the court differs in opinion. In the present case, the petitioner alleged that the proposed new station would cause substantial interference 'well within its 100 uv/m contour'; the supporting engineer's affidavit asserted the same interference and, indeed, showed it at the 200 uv/m contour. The opposition to that petition asserted that the alleged interference would not be from groundwave, and that normal protection, under the Commission's Standards, is against groundwave only. Exam-

IN THE

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR WJR, THE GOODWILL STATION, INC.

OPINIONS BELOW.

The Commission's order granting the application here at issue has not yet been reported (See n. 3). The Commission's decision and order on Respondent's Petition for Reconsideration has not yet been reported (R. 25-27). The opinion of the Court below and its judgment, both entered October 7, 1948, have not yet been reported (R. 38-67, 67-68).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 402(c) of the Communications Act of 1934, as amended, 47 U. S. C. 402(c), and under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. 347(a). Petition for writ of certiorari filed January 4, 1949, was granted by order of this Court entered February 28, 1949, transferring this case to summary docket (R. 71).

QUESTION PRESENTED.

Whether, in a contested case involving a substantial issue before the Commission, it may treat the facts as if on demurrer and dispose of the case by an *ex parte* ruling on the pleadings, without any opportunity for a hearing by oral argument at some stage prior to appeal.[1]

STATUTE AND REGULATIONS.

Relevant provisions of the Communications Act of 1934, as amended, (47 U. S. C. 301-609), hereinafter referred to as "Act", are set out in Appendix A to the Commission's Brief, pp. 48-53. Relevant sections of the Commission's Rules and Regulations, hereinafter referred to as "Rules", are set out in whole or in part in Appendix A to the Com-

[1] The Commission's statement of the question presented both in its Petition for Writ of Certiorari and as revised in its Brief, assumes "that no showing whatsoever has been made that the grant of the new application could operate as a modification of the objector's existing license." This assumption is unwarranted. The argument in the Commission's Brief states that the Commission assumed the truth of the facts as set forth in Respondent's petition before the Commission (p. 33). And Respondent's petition alleged that its present interference-free service over substantial areas in which WJR is the most listened-to station will be subjected to objectionable interference by operation of the Coastal Plains station. The Commission did not move to dismiss Respondent's appeal to the Court below. On the contrary, the Commission did contend and is now contending that Respondent has the right of review on appeal as to the questions of law ruled on *ex parte* by the Commission (R. 55-58, F. C. C. Brief p. 41).

mission's Brief, pp. 53-59, with the exception of Rule 1.893(b) and Rule 3.11, which are printed in n. 12 and n. 16. Provisions of the Commission's Standards of Good Engineering Practice (F.C.C. Brief, pp. 59-60), hereinafter referred to as "Standards", to the extent material, are reproduced in whole or in part in Appendix 1 to this brief.

STATEMENT.

Respondent is the licensee of radio station WJR at Detroit, Michigan. For 20 years Respondent has been the licensee of station WJR. For 13 years Respondent has been licensed to operate as a Class I-A clear channel station, for which is authorized a minimum and maximum power of 50 kw. (Rules 3.22 and 3.25(a)). Its frequency is 760 kc. During nighttime hours there is no station, other than WJR, operating within the continental United States on 760 kc. During daytime hours (prior to this case) there was no station, other than WJR, operating within the continental United States on 760 kc.[2]

On August 22, 1946 the Commission issued a release announcing its order[3] granting, without notice or hearing, the application of Tarboro (now Coastal Plains) Broadcasting Company, Inc., to construct a new station at Tarboro, North Carolina (543 miles southeast of Detroit) to operate *daytime* with a power of 1000 watts on 760 kc, the frequency assigned to Respondent. This action was taken without notice to Respondent and without opportunity for hearing. The action was wholly *ex parte* and without any findings of fact.

On September 10, 1946 Respondent timely filed its Petition for Reconsideration and Hearing (R. 14-18) in ac-

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[2] F. C. C. List of Radio Broadcast Stations, Jan. 1, 1948 (16748); Television Digest, Jan. 1, 1949, P. 56.

[3] The Commission's original order was publicly released Aug. 22, 1946, and is as follows: "Public Notice No. 97431. Report No. 877, Broadcast action. August 22, 1946. Tarboro Broadcasting Co., Inc., granted CP for a new station to operate on 760 kc, 1 kw, daytime only B3-P-4891."

cordance with Section 405 and Rules 1.390 and 1.893. Some three months later the Commission on December 17, 1946 released a Decision and Order denying Respondent's petition (R. 25-27). This action was taken without according Respondent any opportunity for hearing or for oral argument. In the meantime while Respondent's petition was still pending, the Commission on October 14, 1946 issued and delivered its construction permit (R. 21-23) to Coastal Plains. It was required under Paragraph 5 of the permit to commence construction by December 14, 1946 (R. 22).

From the order denying its petition, Respondent filed an appeal January 7, 1947 (R. 1-6) resulting in an opinion and judgment of the Court below reversing the Commission's order and decision.

The Commission's grant *ex parte* of the Coastal Plains application was made under a new interim policy which was announced during the pendency and prior to conclusion of a general rule-making proceeding. (R. 26, R. 39). *In re Clear Channel Broadcasting Service*, Docket No. 6741 (R. 6-8, 26; see R. 10-11).

The Clear Channel Proceeding. Some years prior to the war Respondent, and the licensees of other clear channel stations, applied for an increase in power from 50 kw to 500 kw and sought modification of Rules to remove the 50 kw power ceiling and otherwise to improve and extend service and minimize interference limitations. In the early months of the war the Commission dismissed such applications, including Respondent's, *without prejudice*. This problem was left dormant, under the war-time freeze, until February 20, 1945 when the Commission issued its notice of hearing in said Docket No. 6741 (R. 6-8) to which Respondent was a party as a member of the Clear Channel Broadcasting Service. The hearing was held in Docket No. 6741 beginning January 14, 1946 and ended October 31, 1947 within which period the Commission processed and granted the Coastal Plains application.

While this proceeding in said Docket No. 6741 was in progress and prior to its conclusion, the Commission on February 5, 1946 issued Public Notice 89273 (R. 9-10) announcing an interlocutory procedure as follows:

> (a) Four categories of application for clear channel authorizations were dismissed, subject to reinstatement at the conclusion of the Clear Channel Proceeding, Docket No. 6741 (R. 13).
>
> (b) As to applications requesting *daytime* operation (e.g. Coastal Plains) on a I-A clear channel (e.g. 760 kc licensed to Respondent) the Public Notice provided that each such application would be considered individually on its merits, and, if it presented any complication with the issues in the Clear Channel Proceeding, its grant, if made, would be conditional (R. 10).[4]

The above policy on applications for daytime stations was modified by a second interlocutary procedure set forth in Public Notice 95034 of June 21, 1946 (R. 10-11) as follows:

> (a) Action on applications for daytime stations located *more* than 750 miles from the Class I-A clear

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[4] The Commission's said Public Notice goes on to state: "the Commission has been concerned with the possibility that a grant of a large number of such applications would further complicate the problems that are involved in the Clear Channel Hearing. Further study of this matter has resulted in the conclusion that in many instances placing additional daytime only stations on the U. S. I-A channels may not unduly complicate the problems, and accordingly all such applications will be considered individually on their merits. When no conflict with a resolution of the general problems that are at issue in the Clear Channel Hearing can be foreseen, additional daytime assignments on U. S. I-A channels may be made before conclusion of the hearing. It is, however, possible to foresee that severe complications may arise by authorizing the operation of additional limited time stations, and such applications will be given careful consideration with a view to determining the possible complications, and in the event they can be foreseen, the applications may be conditionally granted for daytime operation only."

gineering basis for grants within and denials beyond a distance of 750 miles nor any correlation between a mileage separation of 750 miles or less and a 100 uv/m contour.

WJR Service and Interference. Respondent's petition before the Commission alleged that operation of the Coastal Plains station would subject the present interference-free service of Station WJR to objectionable interference (R. 15). The affidavit accompanying Respondent's petition established that (R. 16-18):

> (a) *Middle States Area.* Station WJR delivers a useable daytime signal over all or a portion of the states of Indiana, Ohio, Pennsylvania and New York, which would be destroyed by interference from the proposed Coastal Plains station.
>
> (b) *Lower Michigan Area.* Station WJR delivers a useable daytime signal over lower Michigan which in all or a portion of 12 counties in the northern part would be destroyed by interference from the proposed Coastal Plains station. This area includes all of Leelanau, Charlevoia and Cheboygan counties in which there are no broadcast stations, all of Emmet county in which there is one local station (WMBN), and a part of eight other counties in only two of which are stations (WKLA, WTCM), both local.
>
> (c) *Upper Michigan Area.* Station WJR delivers a useable daytime signal over all of the 14 counties of upper Michigan, which would be destroyed by interference from the Coastal Plains station. In seven of these counties there are no radio stations. (There is one local station in each of the other seven counties,

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ination of the Standards shows that the question thus presented was indeed substantial. There is a serious and debatable question whether the Standards, thus the licenses of all Class I clear channel stations, give protection against skywave in the daytime. Therefore, I agree that this appellant was entitled to a hearing before his petition was denied."

WJMS, WSUD, WHDF, WOMJ, WJPD, WMIQ and WDBC).

Over most of the Middle States area above where WJR's present interference-free service would be destroyed, it was conceded that a better signal is provided by other stations. But with respect to both the lower Michigan area and the upper Michigan area above, WJR provides "the best signal available" to most of this region. (The portion excluded would be the built-up city areas and that within the service of the ten local stations.) Also with regard to the lower and upper Michigan area described above, it is established that:

(a) This area is unusually free of atmospheric noise with the result that a very low order of signal will provide an acceptable service, (R. 17) and

(b) In this area WJR is in fact "the most listened to station" based upon the Commission's own Radio Survey compiled for it by the Bureau of Census (R. 17, 33).

The record in this case establishes that station WJR in fact delivers a groundwave service over the three above-described areas, which under Rule 3.11 (n. 16) constitute a portion of Respondent's "primary service area" or "intermittent service area" or both (Appendix I). (Subsequent proceedings established that WJR also provides a secondary service daytime over a more extensive area, n. 7). And the record in this case also establishes that the operation of the Coastal Plains station will cause interference which will destroy WJR's present interference-free service within such areas. Those facts raised an issue of importance clearly relevant to Rule 1.390(4), i. e., "A grant of the application is not in the public interest."

ARGUMENT.

Introduction. This case as presented here by the Commission is without precedent. The Commission is contending both that Respondent is not a person entitled to hearing in a case before the Commission, and also that Respondent is a person entitled to judicial review of that case on appeal. This is something new to the field of administrative law, and turns upside down the doctrine that judicial review is subsequent to final administrative action. The rule contended for by the Commission would result in a person obtaining an initial hearing, not before the administrative tribunal invested with initial jurisdiction over the subject matter, but on appeal from an *ex parte* ruling.

This case is concerned with the procedures applicable to the disposition of a case on a question of law only, as applied to the fact of interference to the interference-free service of an existing station resulting from operation of a proposed new station granted by the Commission without a hearing. The question of law is: Whether the Commission's action in duplicating a new station on the frequency channel assigned to Respondent's station constituted, indirectly, a modification of Respondent's license under Section 312(b) of the Act within the rule of *FCC* v. *NBC*, 319 U. S. 239?

What procedures are involved in the disposition of such question of law?

If that question of law is to be answered in the affirmative or if there is a fact issue involved in such a determination, it is conceded that due procedure would require that Respondent be made a party to the case with the right of notice and hearing in the full sense.[9]

If this question is to be answered in the negative, what are the procedural requirements? The Court below holds

[9] "Accordingly, no question is presented here with respect to procedures that must be followed under the Due Process Clause with respect to the resolution of a question of fact." (F. C. C. Brief, p. 33).

that the Commission *may* treat the petition of the existing station licensee for rehearing as if on demurrer and dispose of the case ~~on the~~ questions of law raised on the face of the petition. ~~But~~ in such case, the Court below holds that the existing station licensee must be accorded the minimal right of hearing by oral argument on the question of law at issue as raised by its Petition for Rehearing.

The Commission contends that the right of such hearing is discretionary and that the Commission can dispose of the case on the pleadings by *ex parte* decision, but subject to review on appeal as to questions of law.[10]

The Commission states that in acting on Respondent's Petition for Reconsideration and Hearing it assumed the truth of the facts as set forth in the Petition.[11]

The Commission contends that it was not required to accord Respondent a hearing, by oral argument or otherwise, on the application of such facts to the Act or to the Rules and Regulations of the Commission, i.e., the procedural requirements in the disposition of a case involving only a question of law does not include the right of hearing by oral argument, since statutory provision is made for the disposition of questions of law including the right of oral argument on appeal.

From the foregoing we can set aside any question as to procedural requirements in a case involving an issue of fact or an issue of fact and of law. In such a case, the opinion of the Court below does not hold that an oral argument is a *sine qua non* of due process. For example, if

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[10] "This availability of judicial review thus affords a safeguard, sufficient for constitutional purposes, against a possibly erroneous interpretation of the statute and the Rules and Regulations." (F. C. C. Brief p. 4).

[11] "After study of the pleadings the Commission, on December 17, 1946, adopted and issued its Decision and Order denying the Petition. This opinion was based on an assumption of the truth of the facts as alleged by the Petitioner with respect to both the pending Clear Channel Proceeding and the alleged interference which would be caused to its service by the operation of the Coastal Plains Station." (F. C. C. Brief p. 33).

the Commission in this case had challenged the facts set forth in Respondent's petition and ordered a hearing on the issues of fact before the Commission, or any delegated Division or Commissioner (Sec. 5), oral argument by Respondent obviously would be discretionary, including reconsideration on petition for rehearing.

The Opinion of the Court below holds that the Commission has the discretion of choosing whether to dispose of the case on an issue of fact, or on an issue of law. The latter procedure is similar to a preliminary hearing on a motion to dismiss as provided for in Rule 12(d) of the Rules of Civil Procedure. Under this procedure, a negative ruling on the question of law raised on the face of Respondent's petition would have disposed of the case finally before the Commission.

The character of "hearing" under review here, therefore, is that hearing appropriate to the disposition administratively of a case on a question of law. The hearing in such a case, with the facts being admitted, is an oral argument. Traditionally, the accepted procedure for the disposition of a case on a question of law only, is by oral argument.

In a case before an administrative tribunal involving a question of fact or a question of mixed fact and law, there is no question as to the right of hearing in the full sense, which may or may not include the right of oral argument as such at some stage in the proceeding. In a case involving a question of law only, the only hearing appropriate to its disposition is an oral argument. It is Respondent's contention, therefore, that if a person has the right to a full hearing on a question of fact, it must follow that a person has the right to a hearing by oral argument on a question of law. And in neither case can disposition be made by an *ex parte* finding or ruling.

It is appropriate at this point to set aside two other matters.

Intervention. Respondent's standing before the Commission in this case was that of a party respondent and not that of a party intervenor. Respondent's petition was not filed under Rule 1.388 entitled "Petitions to Intervene" but was filed under Section 405 of the Act and Rule 1.893(b) which provides that "The petition for rehearing may request (1) reconsideration * * * in cases of applications granted without hearing under Title III of the Act * * *"[12]

The statement in the Commission's Brief, p. 16, that "Leave to intervene was, in essence, what Respondent was asking of the Commission" is patently incorrect.

The minority opinion in the Court below takes off on this false bearing and never thereafter gets back on a true course.[13]

The majority opinion of the Court below does not hold that a permissive intervenor is entitled to oral argument on its petition to intervene. The statement of the Commission on this point beclouds the issue in this case and overlooks the distinction between a party respondent and a party intervenor (R. 54). Compare *FCC* v. *NBC*, *supra*, the *KOA Case* with *SEC* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434. Although in the *KOA Case* the pleading before the Commission was in form an intervention, this

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[12] *Rehearings.* 1.893 "Contents; relief requested.—(a) * * * (b) The petition for rehearing may request (1) reconsideration, either in cases decided after hearing or in cases of applications granted without hearing under title III of the act; (2) reargument; (3) reopening of the proceeding; (4) amendment of any finding, or (5) other relief. Such petition shall be specific as to the form of relief sought and, subject to this requirement, may contain alternative requests."

[13] "But it was basically a Petition to Intervene as it asked that WJR be made a party to the Coastal Plains proceeding" (R.-59). The minority opinion is also in error in assuming that a person who petitions to intervene is not entitled to oral argument, whereas under the Commission's Rules, such a person is accorded right of oral argument in Motions Docket with a right of review before the Commission *en banc*. (Rule 1.741 and 1.745(b).

Court, however, affirmed a reversal of the Commission's decision and held that KOA was entitled to be made a party under Section 312(b) of the Act. The opinion of this Court in that case states (246-347):

> "Certainly one who is to be notified of a hearing and to have the right to show cause is not to be considered a stranger to the proceeding but is, by the very provisions of the statute, to be made a party. * * * In view of the fact that Section 312(b) grants KOA the right to become a party to the proceeding, we think it plain that it is a party aggrieved, or a party whose interests will be adversely affected by the granting of WHDH's application * * *".

Accordingly, if this Respondent had any standing before the Commission in this case, it was that of a party respondent and not that of an intervenor.

b. *Contour Protection.* A fundamental misconception which is the basis of the minority opinion in the Court below is that Respondent's station, as a matter of law, is entitled to protection to its 100 uv/m contour, no more and no less (R. 62), and that the right of Respondent to a hearing coincides, as a matter of law, with such contour. Respondent's license contains no such limitation (R. 12-13, 23-25). Neither does such limitation appear anywhere in the Act or in the Commission's Rules (Commission's Brief pp. 48-58). There is no basis for the suggestion in the minority opinion that Respondent might have but did not obtain a special provision in its license granting additional protection outside and beyond such contour or that there was any necessity under the Commission's Rules or licensing procedures for such a provision. It is sufficient here merely to point out that the 100 uv/m contour did not delineate the interest or lack of interest of a party in the other seven companion daytime cases, *supra*, in each of which interference within such contour was established but the right of the existing station licensee to a hearing, nevertheless, was denied.

There remain for consideration two points: The Due Process question, points I and II in the Commission's Brief, and Respondent's standing before the Commission as an aggrieved person or one whose interests are adversely affected under the Act and the Commission's Rules.

I.

In a Case Before the Commission a Party in Interest is Entitled to a Hearing, Under the Act and the Due Process Clause; Such Hearing to be Limited to Oral Argument if the Commission Chooses to Dispose of the Case on a Question of Law.

1. The opinion of the Court below, fairly interpreted, holds that in such a case the petition of a person requesting reconsideration or (re)hearing of an action granting a new station without a hearing, may be disposed of as follows:

(a) If the party-petitioner clearly fails to establish some special or peculiar interest which may be directly and materially affected or does not have something more than a common concern for obedience to the law, such person may be considered to have no standing as a party in interest to such case and his petition may be *dismissed* without hearing by argument or otherwise. *L. Singer & Sons* v. *U. P. R. Co.*, 311 U. S. 295. For example, the Court below would affirm such action by the Commission in this case if Respondent's interest were limited to that of an applicant in the future for an increase in power if allowed by the proposed rules pending before the Commission (R. 41).

(b) If the party-petitioner establishes itself as an interested person to such case and the allegations of its petition raise an issue of fact, the disposition of which is dependent upon findings of fact by the Commission, then such person is entitled to be made a

party respondent in such case with a right of hearing in the full sense, at some stage prior to final action. Such hearing may or may not include oral argument depending upon the applicable statute and regulations, or depending on whether the case is tried by one person and decided by another person or body. *F. C. C.* v. *N. B. C. supra, Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 339, *Morgan* v. *U. S.*, 298 U. S. 468, *U. S.* v. *Wood*, 61 F. Supp. 175, 179, *Lacomastic Corp.* v. *Parker*, 54 F. Supp. 138, 141.

(c) If the party-petitioner establishes itself as an interested person to such case and the allegations of fact in its petition are accepted as true, the case, at the election of the Commission, may be disposed of as if on demurrer, but with a right of hearing accorded the petitioner. It is sufficient in such case, with the facts being admitted, to dispose of it on the questions of law with the hearing limited to an oral argument. *Londoner* v. *Denver*, 210 U. S. 373, *L. B. Wilson* v. *F. C. C.*, 170 F. 2d 793, *Walker* v. *Popenoe*, 149 F. 2d 511, *Security T. & S. Co.* v. *Lexington*, 203 U. S. 323, *Bourjois* v. *Chapman*, 301 U. S. 183.

The foregoing covers the procedural requirements appropriate to three categories of cases under the rule of the Court's decision below, which neither adds to nor subtracts from the present field of administrative law. The opinion of the Court below, of necessity, ventures one additional category, or a subclassification of category (c) above. All factors are the same, i.e., a case to be disposed of on a question of law only, but with a close question as to the standing of the petitioning party as a person aggrieved or whose interests are affected by the action taken or proposed. The Court below resolves any reasonable doubt as to the standing of a petitioning party as a person in interest in favor of the petitioner, by requiring as a minimal right that such person be granted leave to present orally its claim as an ag-

grieved party. That is the essence of the decision under review.

2. The opinion of the Court below, fairly interpreted, does not hold, as the Commission's Brief contends or implies,—(a) that a stranger to a case is entitled to a hearing or to be heard on its rights to a hearing; or (b) that an intervenor is entitled to be heard on its standing to intervene; or (c) that an oral argument is a matter of right at some stage in a full and fair hearing in a case involving an issue of fact or a mixed question of fact and law; or (d) that, in any such case where a full hearing is required, a party thereto has a right to a preliminary hearing by oral argument on any question of law raised in such case. (This situation arises only if the Commission itself chooses to treat the petition as if on demurrer). The foregoing is clear from the statement in the opinion of the Court below as follows (R. 54-55):

> "WJR as an outstanding licensee is not a mere permissive intervener or, as the minority puts it, an 'outsider'. Under Section 312(b) of the Communications Act and the ruling of the Supreme Court in the KOA case, if the license of WJR as an outstanding station will suffer indirect modification by the operation of the applicant station, Coastal Plains, WJR is entitled to a hearing on the question whether or not such modification is required by the public interest; and under the ruling of this court in the Wilson case it is entitled first to a hearing on the issue modification *vel non* itself and therefore, as above explained, at the threshold to a hearing on the question raised, as if on demurrer, whether or not the allegations of its petition for reconsideration show that there will be an indirect modification of its license by the operation of Coastal Plains."

3. Turning now to Point I of the Commission's Brief, the above analysis shows that its contentions therein are far too sweeping and academic and go way beyond the record in this case or any reasonable interpretation of the opinion here under review.

The Commission is contending for a double standard of due process. No question is raised as to the standard of due process applicable in judicial proceedings. But no clear statement is made as to what standard of due process should be applicable in administrative proceedings. Short of contending that a hearing is discretionary and that respondent was fairly dealt with in being permitted to file its petition, the Commission leaves to uncertain speculation what lesser standard of due process is applicable to administrative proceedings.

The contention that in administrative proceedings due process must not be equated to judicial process (P. 18), is a straw dummy argument. There are, of course, many recognized differences, e.g., that a hearing may succeed rather than precede an administrative action, *U. S.* v. *Wood, supra, Inland Empire District Council* v. *Millis*, 325 U. S. 697, *Phillips* v. *Commissioner*, 283 U. S. 589, or that the trial and decision of a case may be by different persons, *Lacomastic Corp.* v. *Parker, supra, Morgan* v. *U. S., supra.* The flexibility or rigidity of due process procedural requirements is not an issue. In this case there is a total denial of due process at the outset. The degree of fairness in a hearing granted is likewise not an issue. In this case there was no hearing of any kind, fair or unfair, at any stage.

The opinion of the Court below did not decide whether Respondent is or is not a party in interest to this case before the Commission. It held rather that this question must be decided initially by the Commission. Without a decision on this question by the Commission and by the Court below on appeal, it is questioned that this Court should now make that decision initially.

The issue of due process, therefore, is conditional either to a decision that Respondent is a party in interest in this case, or that Respondent is entitled to be heard as to its claim that, as a matter of law, it is an aggrieved person or one whose interests are adversely affected by the Commission's action.

II.

Respondent's Petition Before the Commission Makes Out a Prima Facie Case That It is a Person Aggrieved or Whose Interests Are Adversely Affected by the Commission's Action.

If the allegations of Respondent's petition are clearly frivolous or a sham, the petition should have been dismissed; if not, Respondent should have been heard.

That Respondent has a standing before the Commission as an interested party in this case is in effect admitted both by the Commission's action in not moving to dismiss the appeal, and *a fortiori* by its contention here and in the Court below that Respondent is a person entitled to the right of an appeal under Section 402(b) of the Act to review the Commission's *ex parte* action (n. 10).

1. Turning to the record in this case before the Commission, Respondent's standing as a person in interest, based on its status as the licensee of an existing station, is manifest from a consideration of any one or a combination of the following circumstances:

(a) Until the Commission's action in this case Respondent's station was the only one in the continental United States licensed to operate daytime or nighttime on 760 kc. (n. 2). The Commission's grant in this case was the first instance of any duplication daytime of Respondent's clear channel assignment. Respondent's assignment was, therefore, one of only three unduplicated frequencies, a circumstance most favorable technically to the existence of its extensive present interference-free coverage and to an increase in service in the event of an authorization for use of higher power, which was the principal issue under consideration in the then pending Clear Channel Proceeding, Docket No. 6741.

(b) The facts alleged and here admitted establish that Respondent's station in fact furnishes a usable

and satisfactory radio broadcasting service over the above-described Middle States Area, over all or a portion of 12 counties in the Lower Michigan Area, and over all of the 14 counties in Upper Michigan; that over most of the Lower and Upper Michigan Areas, Respondent's station "provides the best signal available"; and that in such areas Respondent's station "is the most listened to station" according to an official survey of the Bureau of the Census.

(c) Similarly, the facts alleged and admitted establish that all of the above-described service, which is presently free from interference, would be destroyed over all three areas by co-channel interference from operation of the Coastal Plains Station granted by the Commission in this case.

(d) The agreed facts above stated, paragraphs (b) and (c), are fully sufficient to establish that the Commission's action constituted a modification, indirectly, of Respondent's license within the rule of *F.C.C.*, v. *N.B.C.*, *supra*, and that Respondent is a person aggrieved and adversely affected by such action. Compare the *KOA Case*; *Sanders Bros. Radio Station* v. *F.C.C.*, 309 U. S. 470, and *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 339.

2. The above considerations fully qualify Respondent's standing before the Commission as a party in interest and one entitled to a hearing, or at least to be heard, as to its claims as an aggrieved person. However, the agreed facts raised other issues, as follows:

(a) Under the Act's legislative standard of public interest, convenience or necessity, Sec. 319(a); Respondent's petition raised a question of fact as to the comparative public interest between continuation of Respondent's present interference-free service in the Upper and Lower Michigan Areas as against estab-

lishing a new service in the vicinity of Tarboro, North Carolina, the resolution of which question is dependent upon findings of fact in a hearing (Rule 1.390(4)).

(b) That the Public Notice of June 21, 1946, pursuant to which the instant action was taken, is not a valid, statutory rule or regulation either under the Act or the Administrative Procedure Act; and that the 750-mile separation provision is arbitrary and capricious and not supported by any finding and wholly lacking in any technical justification; or in any event, the Commission did not comply with the express terms of its public announcement in that the Coastal Plains application was not "conditionally granted" subject to a final determination in the Clear Channel Hearing.[14] The Coastal Plains permit contains no such condition (R. 21-23).[15]

3. The Commission's Brief revives consideration of the ruling against Respondent in point I of the opinion below (R. 41). In this matter the record shows that Respondent was one of the moving parties to amend the 50 kw power limitation in Rule 3.25(a). A determination of the Clear Channel Proceeding on this issue might have permitted or even required Respondent to increase its power to 500 or 750 kw.

[14] The Commission's Memorandum Opinion on the Clear Channel Group's petition states: "Any grants that are made to daytime stations are subject to whatever changes in the rules may be made as a result of the clear channel hearing." (R. 33).

[15] A condition for the purpose of protecting the Commission and interested parties pending final action in the pending rule-making proceeding, Docket 6741, which has been employed in other grants, would provide: "The Commission reserves the right during said license period, of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period." (R. 17, 33.)

In such event the existence of the Coastal Plains assignment would present a serious obstacle requiring possibly a modification of its license. Therefore, Respondent, as a party in interest to the Clear Channel Proceeding, and pending its conclusion, was also interested in maintaining the status quo as to its channel assignment or at least of requiring that any interim duplication of its channel be conditional to the outcome of the Clear Channel Proceeding. As to this matter, it is Respondent's contention that it is a party in interest to the Commission's action in this case by reason of its status in the Clear Channel Proceeding, as associated with the provision for grants on condition only in said Public Notice, within the rule of *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47. In this case *Western*, based upon its pending application before the Interstate Commerce Commission for a certificate to extend its lines, was held to be a party in interest for the purpose of maintaining a suit to enjoin *Southern Pacific* from constructing a competing line. Similarly, Respondent, as a moving party in the proceeding to increase its power authorization, subject to Rule amendment, was in fact if not in law adversely affected by the Commission's action in this case.

4. The foregoing considerations establish Respondent's standing before the Commission as a party in interest to the action in this case, and taken collectively their cumulative effect leaves no doubt that the Commission's action affects adversely this Respondent. The only color of any contention to the contrary is the Commission's point, a technical one, that Respondent is barred from any interest at or beyond the 100 uv/m contour. This is the sole basis on which the Commission acquiesces in the lower Court's decision in *L. B. Wilson* v. *F. C. C.*, *supra*, and *WJR* v. *F. C. C.*, (No. 9495) .... F. 2d ...., but petitioned for review of the decision in this case.

The resulting issue stated most favorably to the Commission is: Whether the 100 uv/m contour is a limitation to Respondent's license, as a matter of law. It is Respon-

dent's contention that this question is not conclusive of the interests of a licensee and that even if answered in the affirmative, this question is subordinate to the overriding considerations set forth in paragraphs 1, 2 and 3 above. It should be a sufficient answer to this question merely to point out again that the Commission's actions in the other seven skywave cases in denying hearings where interference was established within such contour, do not indicate the existence of any rule or practice of measuring the interest of a person by the 100 uv/m contour.

However, assuming arguendo the contrary, the following considerations show the lack of any basis for that contention of the Commission in this case.

(a) The statutory standard is "public convenience, interest, or necessity" and the terms "contours" or "millivolts" are not found anywhere in the Act. The controlling circumstance under the Act is public service. The admitted fact in this case is that Respondent does render a public service in the areas subject to interference conflict in this case.

(b) Respondent's license contains no contour or uv/m limitation (R. 23-25).

(c) The Commission's Rules and Regulations do not contain the term "100 uv/m contour" (F.C.C. Brief pp. 53-58).

The Commission's Brief, page 39, states that "If Respondent had been afforded oral argument, the only significant contentions it could have made were * * * that the Rules and *Standards* do not mean what they so obviously say".

The only basis for this statement is the 100 uv/m contour point. One phrase in one paragraph of the Standards states "during daytime the Class I station is protected to the 100 uv/m groundwave contour". If that were all, there might be some basis for the Commission's statement, but let us examine other provisions of the Rules and Standards

on this subject and see if they are so obvious or if they mean what they say.

Rule 3.11 defines three classes of service areas as follows:[16]

(a) *Primary Service Area.* This means "the area in which the groundwave is not subject to objectionable interference or objectionable fading". There is no question but what Respondent's station is entitled to be protected from interference to its primary service area. The general definition of this term as appearing in Rule 3.11 is further amplified in a provision of the Commission's Standards with respect to rural areas, as follows (Appendix I):

Rural—all areas during winter or northern areas during summer	0.1 to 0.5 mv/m
Rural—southern areas during summer	0.25 to 1.0 mv/m

From the foregoing table it is apparent that the interference area in question in this case comprising the 24 counties in Upper and Lower Michigan constitutes a northern rural area where a groundwave signal with a field intensity of 0.1 mv/m or 100 uv/m constitutes primary service both during summer and winter.

(b) *Secondary Service Area.* This means "the area served by the skywave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity". This class of service is that provided by skywave and until recently has been associated with night-

[16]Rules Governing Standard Broadcast Stations—3.11 "Service areas.—(a) The term 'primary service area' of a broadcast station means the area in which the groundwave is not subject to objectionable interference or objectionable fading. (b) The term 'secondary service area' of a broadcast station means the area served by the skywave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity. (c) The term 'intermittent service area' of a broadcast station means the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading."

time service only. The Commission's Clear Channel Proceeding, commenced in April, 1945, brought to the attention of the Commission in 1947 that clear-channel stations render a secondary service by skywave during daytime hours. Respondent's petition in 1946 forecast the existence of such daytime skywave service by the statement that there will be some skywave present in the WJR signal and therefore, during the hours from sunrise to 10 A.M. and from 2 P.M. to sunset, interference will exist closer to WJR. This matter was made the subject of a special inquiry in Docket No. 8333 referred to as the *Daytime Skywave Proceeding*, which was subordinate to the Clear Channel Proceeding and subsequently consolidated therein.[17] The evidence in

[17] The Commission's Notice of Hearing in Docket No. 8333 dated May 9, 1947, states as follows: 1. Pike & Fischer, *Radio Regulations*, p. 53:907: "1. Notice is hereby given of proposed rule making in the above-entitled matter. 2. Under the Commission's rules and regulations and Standards of Good Engineering Practice, standard broadcast stations are not protected against daytime skywave transmission nor is there any method prescribed for determining the existence or extent of such transmission. 3. Affidavits have been filed with the Commission alleging that serious interference is resulting to the daytime service area of stations operating on clear channels as a result of skywave transmissions from Class II stations operating daytime on such frequencies which the Commission has authorized. 4. There are many applications still pending which request authority to operate daytime on clear channels. Appeals have been taken to the United States Court of Appeals for the District of Columbia from some orders of the Commission granting such applications. In one such case an order has been issued by that Court staying the effectiveness of a construction permit issued by the Commission. 5. In view of the foregoing a hearing in the above-enttitled matter will be held before the Commission en banc, or such members as may be present, beginning at 10:00 a.m., June 2, 1947, to receive evidence concerning the existence and extent of daytime skywave transmissions of Standard Broadcast Stations and to promulgate whatever rules and regulations may be necessary. 6. The Clear Channel Broadcasting Service, which filed a petition on February 27, 1947, with respect to the subject matter of this proceeding, is hereby made a party to the proceeding. Any other interested person may appear and participate in the hearing by filing a written appearance in duplicate on or before May 26, 1947. 7. Until the hearing is concluded and a decision is announced, the Commission will defer action on all pending applications which

Docket No. 8333, both by government and industry experts, established the existence of such daytime skywave service and there was no substantial disagreement between government and industry engineers on this point. In that proceeding it was made a matter of public record before the Commission, prior to reargument of this case in the Court below, that the Coastal Plains station would cause interference to Respondent's station well within its 100 uv/m contour, both groundwave and skywave, and with even greater interference to its daytime skywave service. These facts came to light subsequent to Respondent's original petition before the Commission in this case and, therefore, although a matter of public record before the Commission, are not physically a part of this record. The Commission's Standards provide as to this class of service that Respondent's station being a Class I station is "assigned on the basis of rendering secondary service". This provision is limited to a skywave signal but is not limited to nighttime service.

(c) *Intermittent Service Area.* This means "the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading". As amplified in the Standards, this class of service is that rendered by a groundwave signal, and begins at the outer boundary of the primary service area and extends outward to where the signal has no service value. As applied to this case, that provision means that the intermittent service area of Respondent's station begins at its 100 uv/m contour and extends outward until the signal has no service value. The record clearly shows in this case that the signal of Respondent's station in question has a definite service value. The Standards go on to state that in certain areas (of which Michigan is one) a signal of only a few microvolts will have a service value. This pro-

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seek daytime or limited time operation on United States *I-A* or *I-B* frequencies. The Commission will announce its decision as soon as possible after the proceeding is closed so that the processing of such applications may be resumed at the earliest possible date." The hearing in Docket No. 8333 was held June 4-6, 1947.

vision also states without qualification that Respondent's station, being a Class I station, is "assigned for protection from interference from other stations into the intermittent service area". The allegation set forth in Respondent's petition fully established the service value of the signal delivered throughout the interference area of Upper and Lower Michigan in question which would be destroyed by the Coastal Plains station.

The Commission's Standards also provide that Respondent's station, being a Class I station, is intended to "render service to all three service areas; namely, primary service area, secondary service area and intermittent service area".

We now repeat the question originally put by the Commission's Brief: Do the Rules and Standard of the Commission really mean what they so obviously say?

The Commission's contention that the 100 uv m contour is, as a matter of law, a limitation to Respondent's license is completely destroyed by another public document of the Commission. The Commission's standard form of Application for New Standard Broadcast Station Construction Permit states: "*The use of the terms 'normally protected contours' and 'objectionable interference' shall not be taken as implying any right to protection of such contours or from such interference*". (R. 14.) If this statement means what it says, it must follow that, as a matter of law, if the 100 uv/m contour does not confer a right, it cannot defeat a remedy.

5. Although the Commission's Standards, the only place containing the term "100 uv m groundwave contour", do not support the Commission's contentions on this point but are decidedly more favorable to Respondent's position as shown above, these Standards do not and are not intended to have the status of statutory regulations. The Standards are set forth in a document of 48 pages and 21 graphs dealing with some 25 subjects such as engineering standards of allocation, field intensity measurements, directional an-

tenna systems, location of transmitters, antenna heights, lamps and paints, direct measurement of power, vacuum tubes, plate efficiency, power tolerance, construction design, indicating instruments, automatic frequency control, frequency monitors, modulation monitors, low temperature crystals, money requirements, common antennae, auxiliary transmitters, equipment, application forms and field offices. In short, the Standards serve as an engineering guide for the preparation of applications, engineering exhibits and testimony, and for the construction, equipping and operation of stations, but they do not, as a matter of law, govern conduct or rights of licensees.[18]

6. The several matters set forth in Paragraphs 4 and 5 above clearly establish that the Commission's Standards, even if considered as statutory rules, do not limit the extent of interference protection to Respondent's station in terms of a 100 uv/m contour. Respondent's petition, pre-

[18] The non-statutory character of the Commission's Standards, as contrasted with its Rules and Regulations, is established by the Commission's statement thereon at the time of their original issue in 1939. *Fifth Annual Report, F. C. C. Fiscal Year ending June 30, 1939*, p. 41: "Scope of Standards of Good Engineering Practice." * * * "Necessity for the standards arises by reason of the fact that all of the technical principles of allocation, and use of facilities cannot be incorporated in the rules and regulations, because of the rapid changes taking place. The rules and regulations cover only the basic and more general principles. To obtain uniformity in presenting technical data on all applications concerning standard broadcast stations, it is necessary that the Commission enunciate the manner and method in which the data shall be presented. This provides a distinct advantage in the administration of the technical regulations, greatly improves the uniformity of action on formal applications, and serves as a guide to engineers. Many of the standards set out certain methods of compiling and submitting data. The provisions of the Standards may be divided into three classes, as follows: (1) Those provisions which are incorporated by reference in the rules and regulations and which have substantially the same meaning and effect as the rules and regulations. (2) Those provisions which go beyond the rules and regulations so as to disclose policies and principles of allocation and regulation. (3) Those provisions which are included primarily as a guide to applicants and licensees."

sented issues of substance and importance. As to those issues, the Commission's Rules and Standards are inconclusive, ambiguous and contradictory. Under the statutory standard of public interest, Respondent's claim and the Commission's admission of the destruction of Station WJR's service over an area comprising some 24 counties, many of which had no local service, and where the FCC Radio Survey establishes that 83% of some 74,240 households reported reception of such service without trouble (R. 33), and that "WJR is the most listened-to station" (R. 17), is neither *frivolous* nor a *sham*.

The Commission's characterization of Respondent's petition as *frivolous* (F.C.C. Brief, pp. 46, 45, 17) is both unfortunate and in disregard of the record. Were the issues presented in the other seven companion daytime clear channel duplication cases, *supra*, insubstantial and frivolous? Are the Commission's Public Notices as to interim-procedure in such cases (R. 9-11) insubstantial and frivolous? Was the Commission's inquiry into this matter in Docket No. 6741 (R. 6-8, 27-33; n. 6, and n. 7) insubstantial and frivolous? If Respondent's petition was frivolous why was it not dismissed forthwith instead of denied three months and one week after filing? If the subject matter of Respondent's petition was frivolous in December, 1946, why did the Commission make that matter the subject of a special hearing in May, 1947, (n. 17) and issue a stop order on the grant of any applications in similar cases? If the issues presented in this case are insubstantial and frivolous, should the Commission contend, as it does, that Respondent has the right of appeal in this case (F.C.C. Brief p. 41, R. 55) with the right of a hearing by oral argument initially before the Court below?

The Commission's contention on this point is completely destroyed by the cases which it cites (F.C.C. Brief p. 17; n. 8). For example, in *Commander Milling Co. v. Westinghouse*, 70 F. 2d 469, the plaintiff's motion to strike special defenses as frivolous was *not* disposed of "summarily" but was subject to consideration both at the beginning and at the con-

clusion of the trial before the District Court and the District Court's grant of the motion was reversed on appeal. The Court's opinion considers the meaning of the terms "sham" and "frivolous" at length and cites with approval one case holding (472):

> "'A sham pleading is one that is false; and to justify the court in striking out a pleading as sham its falsity must be clear and indisputable. Every reasonable doubt must be resolved in favor of the pleading. Where there is a dispute in the affidavits as to the facts upon which the answer must rest, it cannot be said that its falsity is clear and indisputable. Upon such motion the duty of the court is to determine whether there is an issue to try, not to try the issue.'"

In *Hespe v. Corning Glass Works*, 9 F. Supp. 725, 728, the Court considers the meaning of the term "frivolous" as follows:

> "Matter contained in an answer is 'frivolous' when it conclusively and without the necessity of argument appears bad on its face (*Young v. Kent*, 46 N.Y. 672; *Cook v. Warren*, 88 N.Y. 37), or is obviously imposed in bad faith (*Curran v. Arps* 141 App. Div. 659, 662, 125 N.Y.S. 993), and affidavits may not be received on a motion to strike it out (*Daniel v. Goodyear Shoe Mach. Co.*, 67 App. Div. 498, 73 N.Y.S. 875). If it requires careful examination and argument to answer the matter set up in the defense, it cannot be stricken out as 'frivolous'. See cases supra; *Dominion Nat. Bank of Bristol v. Olympia Cotton Mills et al.* (C.C.) 128 F. 181.
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> * * * *
>
> "In regard to the fourth separate defense, it is doubtful whether the defendant can avail itself of the matters set up. Notwithstanding this, it requires argument and considerable examination of the contract and a sufficiently substantial investigation of all the facts and circumstances to decide that question, and for that reason it is deemed best not to strike the defense out at this time, but to leave the matter open for the trial and without prejudice to a motion to strike out at the opening of the trial."

The above-cited cases establish that in a case involving a close question as to whether or not allegations are frivolous, every reasonable doubt must be resolved in favor of the pleading. If an argument is required to show that the pleading is bad, it is not frivolous. *Commander Milling Co.* v. *Westinghouse*, *supra*; *Samuel Goldwyn* v. *United Artists Corp.*, 35 F. Supp. 633, 637; *U. S.* v. *Aho*, 51 F. Supp. 137, 139.

The Commission's Brief on this question points up a rule for determining whether, in such a case, a petition should be dismissed or should be heard. If the allegations of the petition are clearly frivolous or a sham, dismissal is a proper action. If otherwise, the petition should be heard. Or, in case of a reasonable doubt, that should be resolved in favor of a hearing at least by oral argument. In any event this question should be disposed of initially by the Commission and prior to appeal. Such a rule is entirely consistent with the opinion of the Court below.

CONCLUSION.

For the reasons above set forth, it is respectfully submitted that the judgment of the Court below should be affirmed.

This brief does not venture into a discussion on the merits of the correspondence between the Office of the Solicitor General and the thirteen Federal Departments and Independent Agencies set out in Appendix B of the Commission's Brief.[19] Althought there is much in this file of correspondence favorable to the opinion of the Court below,

[19] Appendix B contains no explanation of the failure to send letters to or, if sent, the failure to print replies from the following departments or agencies: Department of the Treasury, Bureau of Internal Revenue, Bureau of Customs; Department of the Army. *See Clarksburg-Columbus Short Route Bridge Co.* v. *Woodring*, 89 F. 2d 788, 790; Department of Justice, Immigration and Naturalization Service, Board of Immigration Appeals; Civil Aeronautics Board; Civil Service Commission; Federal Reserve System; Housing and Home Finance Agency; Tariff Commission; and Veterans Administration.

which is surprising in view of the partisan character of the Solicitor General's letter, such file of correspondence, whether favorable or unfavorable is neither proper nor relevant to this record or to the issues in this case.

The letter from the Office of the Solicitor General unfortunately is both leading and misleading and the questions put are, to say the least, "loaded". The letter violates all precepts of an impartial inquiry of truth. Respondent, therefore, has sent a letter addressed to each of the Departments and Agencies listed in said Appendix B, enclosing a copy of this brief, and requesting a reconsideration of this matter and a further reply to the Office of the Solicitor General for his submission to the Clerk of this Court. A copy of Respondent's letter is set out in Appendix II of this Brief.

Louis G. Caldwell,
Donald C. Beelar,
Percy H. Russell, Jr.,
Counsel for Respondent.

APPENDIX I.

Standards of Good Engineering Practice Concerning Standard Broadcast Stations (550-1600 KC).

(4. F. R. 2862)

October 30, 1947

1. Engineering Standards of Allocation

* * * * *

When it is shown that primary service is rendered by any of the above classes of stations, beyond the normally protected contour, and when primary service to approximately 90 percent of the population (population served with adequate signal) of the area between the normally protected contour and the contour to which such station actually serves, is not supplied by any other station or stations carrying the same general program service, the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration.

* * * * *

The several classes of broadcast stations have in general three service areas (Rule 3.14); namely, primary, secondary, and intermittent service areas. **Class I stations render service to all three service areas.** (See n. 16.)

* * * * *

The signals necessary to render the different types of service are listed below.

TABLE I.—Primary service

Area:	Field intensity groundwave
City business or factory areas	40 to 50 mv/m
City residential areas	2 to 10 mv/m
Rural—all areas during winter or northern areas during summer	0.1 to 0.5 mv/m
Rural—southern areas during summer	0.25 to 1.0 mv/m

* * * *

Secondary Service

Secondary service is delivered in the areas where the skywave for 50 percent or more of the time has a field intensity of 500 uv/m or greater. It is not considered that satisfactory secondary service can be rendered to cities unless the skywave approaches in value the groundwave required for primary service. The secondary service is necessarily subject to some interference and extensive fading whereas the primary service area of a station is subject to no objectionable interference or fading. **Class I stations only are assigned on the basis of rendering secondary service.**

Intermittent Service

The intermittent service is rendered by the groundwave and begins at the outer boundary of the primary service area and extends to the value of signal where it may be considered as having no further service value. This may be down to only a few microvolts in certain areas and up to several millivolts in other areas of high noise level, interference from other stations, or objectionable fading at night. The intermittent service area may vary widely from day to night and generally varies from time to time as the name implies. **Only Class I stations are assigned for protection from interference from other stations into the intermittent service area.**

(Bold type added.)

APPENDIX II

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS
National Press Building
Washington 4, D.C.

To: U. S. Department of Agriculture, Office of the Solicitor
U. S. Department of the Interior, Office of the Solicitor
U. S. Department of Labor, Office of the Solicitor
Post Office Department, Office of the Solicitor
Department of Commerce, Office of the Solicitor
Interstate Commerce Commission, Office of the Chief Counsel
National Labor Relations Board, General Counsel
U. S. Maritime Commission, Office of the Solicitor
Federal Power Commission, General Counsel
Railroad Retirement Board, General Counsel
U. S. Securities & Exchange Commission, General Counsel
Federal Security Agency, General Counsel
Federal Trade Commission, General Counsel

Gentlemen:

Re: *WJR, The Goodwill Station Inc. v. Federal Communications Commission (U. S. Supreme Court No. 195)*

Reference is made to the letter of the Solicitor General, Department of Justice, dated February 3, 1949, and to your reply thereto regarding the above-cited case. You will recall that the Solicitor General requested a statement of your comments for use in preparation of the Government's brief in the above case before the U. S. Supreme Court. Your reply together with replies to an identical letter from twelve other departments and agencies have been printed as Appendix B to the Government's brief filed 12 April 1949 with the Office of the Clerk of the U. S. Supreme Court.

There is enclosed for your information and file a copy of the reply brief on behalf of WJR, The Goodwill Station, Inc., Respondent. Your attention is invited to Respondent's

contention in the conclusion part of its brief that the above-described letter of the Solicitor General is both leading and misleading. The several replies considered collectively support Respondent's contention that the statements made in the letter of the Solicitor General and the questions put do not fairly and correctly interpret the opinion of Harold M. Stephens, Chief Judge, U. S. Court of Appeals, District of Columbia Circuit. Several of the replies, therefore, understandably express concern as to various matters not encompassed in the opinion under consideration. For example:

(a) The opinion does not hold that a stranger to a case or a petition which is frivolous or a sham is entitled to be heard.

(b) The opinion does not hold that a person seeking to intervene in a case is entitled to be heard upon his petition to intervene.

(c) The opinion does not hold that an oral argument is a matter of right at some stage in a hearing on a case involving issues of fact or mixed questions of fact and law.

(d) The opinion does not hold that in a case involving a hearing a party thereto has any right to a preliminary hearing by oral argument on the questions of law raised in such case.

We are satisfied that your further examination of the Court's opinion with the aid of this brief will convince you as to the correctness of the foregoing statements. Respondent's understanding of the Court's opinion is that in a contested case before the Commission under the Communications Act of 1934, as amended, the Commission may grant a full hearing on the facts in the usual sense or, at its election, it may treat the allegations of a petition by an interested party as if on demurrer and dispose of the case on the questions of law presented, by according the petitioner a hearing by oral argument at some stage prior to appeal.

The right of oral argument, as such, is clearly not involved. The right to a hearing is the cornerstone of the Court's opinion and the type of hearing on a case involving questions of law only is, of course, an oral argument.

We are certain you will agree upon reading the enclosed brief that Respondent's stake in this case before the Commission was substantial and that its petition raised important and substantial questions which were clearly not frivolous. The Commission's order under review granted a new radio station at Tarboro, North Carolina, to operate on the same frequency channel as that assigned to Respondent's clear channel station at Detroit, Michigan. Prior to this action, there was no other station operating in the United States on the frequency licensed to Respondent. Operation of the new station would result in interference to Respondent's station and destroy its existing interference-free service over an area covered by some 24 counties in Upper and Lower Michigan. Over most of this area, Respondent's station delivers the best signal available and is the most listened-to station as established by the Commission's own official survey. There is no dispute as to the fact that the Commission's action would destroy this service being rendered by Respondent's station. Whether Respondent's station as a matter of law is entitled to protection as to such service, is a question which is wide open under the Commission's Regulations and as to which the Commission's Regulations and Engineering Standards are either favorable to Respondent or are inconclusive, ambiguous and conflicting. The treatment of this subject is a matter which is pending before the Commission in a rule-making proceeding which was commenced in July, 1945 and which, after four years, is still pending and undecided.

In view of the publication of your letter, it is requested that you reexamine the opinion of the Court below in the light of the foregoing statements and determine for yourself the fairness of Respondent's statements and contentions as set forth herein. In fairness to the publication of

your statements, it is requested that you reconsider this matter and by letter to the Solicitor General set forth such conclusions and comments as may occur to you on restudy of this case.

Specifically, the question is this: In a matter acted on without a hearing, which, upon petition for reconsideration thereof, establishes that such action aggrieves and adversely affects the petitioner, would your agency, nevertheless, dispose of the case without any hearing; or, if at your election the allegations of the petition are considered true, would your agency dispose of the case on the questions of law involved but without any hearing by oral argument; or, if the allegations of the petitioner are not frivolous but raise a reasonable doubt as to the questions of fact or questions of law, would your agency dispose of the case by *ex parte* action without according the petitioner a hearing by oral argument on the validity of its claims?

Respectfully,

KIRKLAND, FLEMING, GREEN,
MARTIN & ELLIS

LOUIS G. CALDWELL

April 18, 1949.